IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOCELYN TOMPKIN, ETC., ET AL.,	)	
	)	
Plaintiffs,	)	Judge David D. Dowd, Jr.
	)	Akron, Ohio
vs.	)	
	)	Civil Action
AMERICAN BRANDS, INC., ET AL.,	)	Number 5:94CV1302
	)	
Defendants.	)	

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TRANSCRIPT OF TRIAL PROCEEDINGS HAD BEFORE

THE HONORABLE DAVID D. DOWD, JR.,

JUDGE OF SAID COURT, AND A JURY,

ON WEDNESDAY, OCTOBER 3, 2001.

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VOLUME 8

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THE COURT: Good morning. One juror short at the moment.

MR. COFER: Your Honor, we have one matter we need to raise before the jury comes in.

THE COURT: Okay.

MR. COFER: With the Court's permission.

Last night, I just got the last half of it, there was a program on television on NOVA, it was Channel 5 on my cable in my hotel room. I think it was PBS, but I'm not sure exactly what channel.

But anyhow, it was called Search for a Safe Cigarette and it talked about, you know, cigarettes from the beginning, had accusations and allegations from other cases, they had interviews with a number of people who have testified for the plaintiffs in these lawsuits. They had matters which I think are extraordinarily prejudicial and inflammatory.

And from my perspective, the presentation was one-sided. And my concern is that some members of the jury may have seen it or part of it, and I'm concerned that may have some impact on their decision in the case.

I was wondering whether it would be appropriate for the Court to just inquire generally did anyone see a program about cigarettes. If so, find out who it was, maybe talk to them in private and just see what

they saw to make sure that there's no issue of contamination.

THE COURT: Well, that's a slippery slope once I start down that slope.

Years ago, we had a criminal case where we were -- I believe the lawyer was a defendant. The case involved Reuben Sturman peripherally, and ABC -- I was told that ABC was going to do a news story on Reuben Sturman and tampering of the juries. I was told about it at the conclusion of the testimony on the day the program was going to run in the evening. For all I know, Mr. McLaughlin was the U.S. Attorney at the time.

Anyway, I had a heads up there was a problem, so I instructed the jury -- and the jury was deliberating, we were also past the trial, the jury was deliberating, and

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16 I instructed the jury that they were not to watch
17 television that night. "Just take my word, don't watch
18 television." That's all I said.
19 They came back at 9:30 in the morning with a
20 conviction. I then isolated the jurors and asked
21 one-by-one, "Do you remember my instruction? Yes. Did you
22 watch television last night? No."
23 And I went through the entire jury and
24 cleaned it up that way, and the conviction was affirmed.
25 But I had a heads up --

1 MR. COFER: Right.
2 THE COURT: -- that there was a problem.
3 Now, I had no heads up in this case, not that
4 I'm being in any way critical of anybody. But to inquire
5 about the jurors as to their -- what they have watched on
6 television seems to me to cause as many problems as to
7 remain silent. That's why I talk about the slippery slope.
8 I don't know where I'm going once I open that discussion.
9 MR. COFER: Well, what I would suggest, Your
10 Honor, is maybe you could just ask did anyone watch TV last
11 night, did anyone see a program on NOVA.
12 THE COURT: Of course, I do it one-by-one,
13 but the problem is the moment I do it -- you see, I have a
14 jury that hasn't decided the case yet. In the other case
15 they had decided the case.
16 MR. COFER: Right. Right.
17 THE COURT: Here I don't have a jury that's
18 decided the case, and I'm suggesting by the questioning
19 process that something happened that was a big deal on
20 television, and now I've wetted their appetite, because the
21 likelihood anybody saw the show is probably remote.
22 MR. MILLIMAN: I caught it channel surfing.
23 THE COURT: There was an interesting
24 television show last night that would have captured
25 people's attention and I think it started at the same time,

1 and maybe it started at 10:00. That was the NBC story
2 on -- was it Flight 93? And it was a fascinating one. I
3 finally went to bed before it was over, I knew what the
4 conclusion was, but it was really good television talking
5 about the -- all the family members that had been talking
6 to their family members during that -- the hostage takeover
7 of that plane which eventually crashed somewhere in
8 Pennsylvania for -- no one knows quite what brought the
9 plane down.
10 But they stopped it from hitting the target
11 in D.C., whatever it was.
12 That was a gripping story. That was the
13 major thing on television last night unless you wanted to
14 watch Rocker blow a game for the Indians.
15 MR. MILLIMAN: It started at 8:00. I caught
16 it about 8:15 just channel surfing, so I don't know if it's
17 going to be rerun, and one of the things, PBS sometimes
18 reruns the shows, too. So that's --
19 MR. COFER: Well, let me be specific, then.
20 I think what I saw of the show -- and
21 Mr. Milliman called me and told me and I watched it
22 obviously to see what was going to be reported -- but when
23 he called me, John Slate was giving an interview.
24 Between 1953 and 1956, the original Kent
25 micronite filter had crocidolite asbestos in it.

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1 Mr. Tompkin did not smoke Kent until 1961, I believe. But
2 if the jury just caught a glimpse of that, they might be
3 confused to think the source of the asbestos was Kent. And
4 it was not. It is absolutely uncontested that he did not
5 smoke the cigarettes then.
6 The problem is Slate even featured one of the
7 advertisements that's been admitted in this case. The
8 thing that's interesting about this case, one thing and
9 I'll talk about it in closing, Mr. Tompkin said he saw
10 these ads, these Kent ads, but he saw them eight years
11 before he ever smoked the product.
12 And so I'm really concerned that if a juror
13 just caught a portion of that and said, well, shoot, that's
14 where the asbestos came from, and it's crystal clear there
15 is not a shred of evidence, and he made it very clear he
16 never smoked Kent until '60 or '61. That's my major
17 primary concern.
18 It also had stuff about palladium and Liggett
19 and it interviewed --
20 THE COURT: Let me ask this question: Has
21 there been any television coverage of this case?
22 MR. COFER: There was an article in the
23 paper, but I see no television coverage.
24 MR. McLAUGHLIN: I don't know one way or the
25 other.

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1 MR. COFER: But one thing I think the Court
2 can do without necessarily arousing the jury's curiosity is
3 to say something like, "You know, we are getting close to
4 the end of the case. It's important that you confine your
5 consideration to the evidence. I don't know whether any of
6 you have seen any shows or read any newspaper articles
7 about tobacco or any of the subjects, but obviously you
8 should not consider those. Has anyone seen anything they
9 think might, you know, influences them or whatever?"
10 If they raise their hand, we can take a break
11 and go talk. If they say no, let's just move on and forget
12 about it. Because we are getting close to where we are
13 going to rest, so it might be an appropriate time.
14 And I'm confident the Court could do it in
15 such a way the jury would not know whether it favored
16 defendants or favored plaintiffs or -- that's -- I wanted
17 to bring it to the Court's attention.
18 THE COURT: I appreciate you bringing it to
19 my attention.
20 I'm still struggling with what the proper
21 process is.
22 MR. COFER: And I don't think we need to
23 decide it before the jury comes in this morning, so I think
24 the Court clearly can mull it over and decide the best
25 course.

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1 But I've had other cases, many times you have
2 publicity in the middle of the case or before the case. 60
3 Minutes frequently runs their programs, I won't say they do
4 it on purpose, but it's more than a coincidence that they
5 run the Sunday night before you pick a jury.
6 THE COURT: You know, what if the jury has
7 been watching old movies and sees everybody smoking?
8 That's characteristic of old movies, everybody smoking.
9 MR. COFER: I think that's different than
10 turning on and having PBS with the aura of the documentary
11 saying, "And the Kent micronite had the greatest health

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12 protection and it had crocidolite asbestos in it so years
13 later there were claims of mesothelioma. The only
14 documented source of exposure was from the Kent micronite
15 filter."
16 THE COURT: What if some juror says they saw
17 that?
18 MR. COFER: Take the juror back in chambers
19 and say "What did you see, what are your impressions, do
20 you understand there is no claim -- Mr. Tompkin did not
21 smoke those cigarettes. Do you understand that? Would
22 that in any way affect your ability to be fair and
23 impartial?"
24 And if he or she says no, it wouldn't, then
25 that's fine.

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1 But, see, I'll tell you, this litigation,
2 we've had these cases -- actually I was one of the trial
3 lawyers in the first Kent case, so that's why I'm so
4 familiar and sensitive with these. We have had a series of
5 these cases around the country. I think we have had nine
6 defense verdicts in these cases.
7 It turns out it wasn't in the product very
8 long, it wasn't a very popular cigarette then, because it
9 was like smoking a mattress. You couldn't get any smoke
10 through the filter.
11 Just to flesh the story out, the A.M.A.
12 tested some cigarettes in the early fifties and said it was
13 the most effective filter. The problem is it was a lousy
14 smoke.
15 "Reader's Digest" ran an article in '57
16 saying, "Hey, this is a great filter." By that time, the
17 asbestos was already out of it.
18 THE COURT: Well, I'll take it into
19 consideration.
20 Are all the jurors here?
21 THE CLERK: Yes.
22 THE COURT: Let's bring them in.
23 MR. SMITH: Your Honor, there is one item if
24 I could bring to the Court's attention, please?
25 The question regarding rebuttal, Dr. Whelan,

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1 these are the facts I would like to put before the Court.
2 This is a backdrop, and I'm not saying that
3 this is the reason for this problem, but I think it is a
4 backdrop. She's from New York City. Last week they went
5 to four funerals of friends. Her husband is one of the
6 leaders of a Wall Street or, I'm sorry, a large commercial
7 firm that was in the Trade Tower, and everyone lived, but
8 300 persons, everything was destroyed. She was in a mess
9 last week.
10 She didn't want to fly. I am not saying to
11 the Court that she could not rise to the occasion to fly
12 today, but I will say that's an honest backdrop.
13 But the problem she presents to me is that
14 she has a mother that is very ill and she does not wish to
15 leave the New York, New Jersey area where her mother is.
16 In fact, she's scheduled to take her to do something later
17 tomorrow involving a doctor.
18 But that's a long way of requesting --
19 THE COURT: You are not sure when you can
20 produce her, is that what you are saying?
21 MR. SMITH: No, it's a long way of requesting
22 if we could, if we could set up the video conferencing that

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23 we had spoken of.
24 And there's item two that I'd like to put in
25 there so the Court gets my full request.

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1 Dr. Whelan is a witness who, I believe, can
2 present the TI and the TIRC documents to the Court's
3 satisfaction.
4 THE COURT: Well, that's a second matter.
5 MR. SMITH: Yes, sir.
6 THE COURT: The first matter is her
7 availability.
8 And I don't want to mix the two.
9 MR. SMITH: No, but I wanted to give you
10 my -- I didn't want to hold it back.
11 THE COURT: She can't drive? She just
12 doesn't want to be away that long, is that correct?
13 MR. SMITH: That's correct.
14 THE COURT: Is her mother dangerously ill?
15 MR. SMITH: Her mother, it is my
16 understanding, suffers from -- starts with an A and it's
17 the Ronald Reagan disease.
18 MR. McLAUGHLIN: Alzheimer's.
19 THE COURT: Alzheimer's, that's not a --
20 MR. SMITH: Pardon?
21 THE COURT: That's not a life-threatening
22 disease, normally. It's a terrible situation, but --
23 MR. SMITH: She is supposed to do something
24 with her tomorrow, and I can't tell the Court, it's
25 something involving doctors and it was scheduled, and she's

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1 firm on it.
2 THE COURT: Tomorrow is Thursday?
3 MR. SMITH: Yes, sir.
4 But I would say in all honesty, she was not
5 willing to get on a plane last week for fear. She was a
6 basket -- she saw her husband the morning of the crash, and
7 went upstairs, she knew he was alive, went upstairs, he was
8 outside, turned on the TV and down it came.
9 And that, that was a --
10 THE COURT: How old is she?
11 MR. SMITH: Dr. Whelan, Your Honor, I don't
12 know. I'm going to guess early fifties.
13 THE COURT: I'm asking you --
14 MR. SMITH: That's my ballpark.
15 MR. COFER: Whelan? Dr. Whelan is probably
16 53, would be my guess.
17 MR. SMITH: I was in the ballpark.
18 MR. COFER: Something like that.
19 MR. McLAUGHLIN: Mid-fifties.
20 THE COURT: Well, I know that people are so
21 indoctrinated with the idea you have to fly every place,
22 but you can drive from New York to here in about seven or
23 eight hours.
24 It's not that hard to drive. I could do that
25 in my sleep.

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1 MR. SMITH: That's something that Your Honor
2 could do. It's something I believe I can do. But that's
3 in my -- I have, frankly, driven from New York and
4 hitchhiked from New York, and I'll tell you --
5 MR. McLAUGHLIN: That's great, Russ.
6 MR. COFER: Keep this on the record. I want
7 to hear this.

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8 MR. SMITH: It's not a -- that's quite a
9 story.
10 MR. McLAUGHLIN: I'll bet it is.
11 MR. SMITH: You have to really hustle to make
12 it in seven or eight hours, Your Honor.
13 THE COURT: I'll give you eight hours. But I
14 mean, it's not a long trip.
15 And have you suggested that to her, that
16 driving is really not that difficult?
17 MR. SMITH: To tell you truth, I didn't have
18 the guts. I mean, frankly, that's a -- if she started,
19 particularly she wants -- she's -- she refuses to leave New
20 York because of her mom. I can't --
21 THE COURT: Can she bring her mom with her?
22 MR. SMITH: Her mother is in -- she is across
23 in New Jersey and I don't know all the details, I just got
24 them yesterday, and I think she probably, I mean human
25 psyche, I suspect she is probably more protective now but I

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1 can't --
2 THE COURT: Make a little vacation out of it,
3 drive her mother out here. See the Rock-N-Roll and the --
4 MR. SMITH: Take her down to the football
5 Hall of Fame.
6 THE COURT: Right.
7 MR. COFER: I would think in New York they
8 probably ought to have someplace, you know, where they
9 could do the live video.
10 MR. SMITH: That's what we are trying to set
11 up.
12 In fact, I suggested to her that she could --
13 possibly, we could find a place close to exactly where her
14 mother is.
15 But that's my situation.
16 MR. COFER: I'm not suggesting -- I'm not
17 suggesting this is what we should do, but I do know that
18 the Nike center has video capabilities. They have a
19 separate, they have a big conference room, they have a big
20 screen. I'm not suggesting we take the jury outside of the
21 courthouse. I just point that out.
22 THE COURT: Let's get through the day and see
23 where we are.
24 MR. SMITH: Yes, sir.
25 THE COURT: I mean, they took a lot of

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1 time -- you have two more experts coming, right?
2 MR. McLAUGHLIN: Two more after Dr. Bradley,
3 that's right, Judge.
4 THE COURT: Yeah, and the Bradley thing may
5 take a good part of the morning. We've got two more. You
6 took almost two hours to question Bradley yesterday, so I'm
7 not sure you'll get through today.
8 But we will work with you on Dr. Whelan. It
9 certainly is to your advantage to have her present. Seems
10 to me, that's more effective than video, especially if we
11 get into a discussion about exhibits. It's almost
12 impossible to handle that if we have a dispute over
13 exhibits.
14 MR. SMITH: The only way I could do it is fly
15 them to New York tonight, have somebody fly them.
16 THE COURT: I mean, it's just awkward to
17 break up that type of video deposition with running up to
18 the side-bar, she's not here. So I would really encourage

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19 you to try to convince her that she should make every
20 effort to come.
21 It's her -- it was her presentation that
22 persuaded the Sixth Circuit to reverse me in the first
23 place. She is a very important person in this case.
24 MR. SMITH: She --
25 THE COURT: On this issue of common

1 knowledge.
2 But I would ask you to be kind of creative
3 with her, and I'll be prepared to be creative with you.
4 MR. SMITH: Yes, sir.
5 THE COURT: All right. Let's go on with our
6 day.
7 (Pause).
8 (Jury in).
9 THE COURT: Good morning. Please be seated.
10 You may cross-examine Dr. Bradley.
11 MR. SMITH: Thank you, Your Honor.
12 CROSS-EXAMINATION OF EDWIN BRADLEY
13 BY MR. SMITH:
14 Q. Good morning, ladies and gentlemen.
15 Dr. Bradley, good morning.
16 A. How are you?
17 Q. Dr. Bradley, you did prepare a report in this case,
18 is that true?
19 A. Yes, sir.
20 Q. And you've prepared reports in other cases, is that
21 true, sir?
22 A. Yes, sir.
23 Q. Would you please look at the last page of your
24 report, sir?
25 MR. SMITH: May I approach the easel, Your

1 Honor?
2 THE COURT: Yes.
3 A. Yes, I'm on the last page.
4 Q. If you would go to, I think the last paragraph is
5 Paragraph 46, and there you indicate that you may address
6 the question of smoking cessation in the development of
7 adenocarcinoma of the lung?
8 A. Yes.
9 Q. Is that true?
10 A. Yes, sir.
11 Q. And the paragraph right before that is the
12 next-to-last paragraph and it's Paragraph 45, is that
13 correct?
14 A. Yes.
15 Q. And I'm going to attempt to catch some of the words
16 as it goes through here, but I -- so for that reason, I
17 would ask you to go a little bit slowly through this, if
18 you'd be so kind, okay, when you read it?
19 A. You want me to read the paragraph?
20 Q. Yes, sir.
21 A. 45?
22 Q. Yes, sir.
23 A. "I will also testify --"
24 Q. Can you stop right there?
25 You say there that "I will also testify," is

1 that true?

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2 A. That's correct.
3 Q. Now, in fairness, I've underlined the word "Will" but
4 the word "Will" is not underlined in your report?
5 A. That's correct.
6 Q. Okay. And then after that, what do you -- what are
7 the next six words, please?
8 A. "That it is not possible to determine."
9 Q. I need a better marker. Running out of markers if
10 I'm not careful.
11 And again, I'm underlining something, and the
12 words are "Not possible," is that correct?
13 A. Yes, sir.
14 Q. And a different way of saying "Not possible," means
15 it's undoable, it's impossible, is that --
16 A. I would agree with that, yes.
17 Q. Okay. To determine what, sir?
18 A. "To a reasonable degree of scientific certainty."
19 Q. Okay. That's the standard that an expert has to
20 speak from, is that true?
21 A. Yes, sir.
22 Q. So I'll just, I'm going to put three dots there, but
23 I want to say I'm not hiding anything there.
24 That's the normal standard, right?
25 A. Yes, sir.

1 Q. I didn't want to use the time.
2 Okay. Then if you'd go from there.
3 A. "Which of the risk factors."
4 Q. Okay, sir.
5 A. "Smoking or asbestos exposure."
6 Q. And again, I'm underlining something that is not
7 underlined in your report, "Smoking or asbestos exposure."
8 A. Correct.
9 "Or other risk factors."
10 Q. And that's in parentheses, right?
11 A. Yes, sir.
12 Q. Okay, sir.
13 A. "Contributed to Mr. Tompkin's lung cancer."
14 Q. Okay. Did I copy that accurately?
15 A. Yes, sir.
16 Q. Okay.
17 A. "When the only available data are from
18 epidemiological studies."
19 Q. And that's the data you were using, is that correct?
20 A. That's correct.
21 Q. So you are saying within the realm of your science,
22 it was impossible to do so?
23 A. Well, if there's more than one risk factor present,
24 it's impossible to disentangle which one would have caused
25 his lung cancer. However --

1 Q. Go ahead. Say anything you want.
2 A. However, however, I applied the epidemiological
3 principle to determine there was no association between his
4 smoking history and an increased risk of lung cancer.
5 And under the epidemiological principle, if
6 there is not an association, then there cannot be
7 causation. So the smoking was not -- could not be a
8 contributing factor.
9 Q. Okay. We will come back to that.
10 Is there anything else you wish to say?

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11 A. No, that's all.
12 Q. Okay. Continue.
13 A. Reading the paragraph?
14 Q. Yes, sir.
15 A. "The difficulties of disentangling the relationship
16 amongst several factors while attempting to control for
17 confounding have been --"
18 THE COURT: Wait a minute. You are -- read
19 just a little slower. You are starting to swallow your
20 words.
21 A. "The difficulties of disentangling the relationship
22 among several factors while attempting to control for
23 confounding have been recognized in the scientific
24 community."
25 Q. What I'd like to do -- well, maybe I'll do it either

1 way.
2 I'd like to keep it on one page, I'd like to
3 put "Difficulties of disentangling the relationship among
4 several factors."
5 Would that capture the essence of that last
6 sentence, or do you want me to put more there?
7 A. That's -- that's okay.
8 Q. Is that fair?
9 A. Yes.
10 Q. And I've shortened that last sentence, it should say
11 totally "The difficulties of disentangling the relationship
12 among several factors while attempting to control for
13 confounding have been recognized in the scientific
14 community."
15 Is that correct, sir?
16 A. Yes. That's correct. Yes, sir.
17 Q. And you signed that report on that same page, is that
18 correct?
19 A. That's correct.
20 Q. And the date of that report?
21 A. May 14th, 2001.
22 Q. Okay. The risk factors that you referred to are
23 smoking and asbestos, and in parentheses other risk
24 factors, is that correct?
25 A. Yes, sir.

1 Q. Your background is -- your schooling, you have a
2 doctor's degree in statistics, is that correct?
3 A. Yes, sir.
4 Q. And, in fact, you have somebody who works with you
5 who has a doctor's degree in biostatistics, is that true?
6 A. Yes, sir.
7 Q. And is that Dr. Fox?
8 A. Yes, sir, it is.
9 Q. You had a number that was on the very professionally
10 prepared board. It was a nice board, wasn't it?
11 A. I thought it was a very nice board.
12 Q. Did you personally do that yourself?
13 A. I dummied up the board and then I gave them to
14 Mr. McLaughlin and he had the board prepared.
15 Q. Your --
16 A. To my specification.
17 Q. Attorney McLaughlin?
18 A. Yes, sir.
19 Q. Okay. Well, it was nice; very professionally done.

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20 And how long ago was that done?
21 A. That was probably done probably about two or three
22 weeks ago.
23 Q. And about how long before that did you indicate to
24 Attorney McLaughlin that you were going to want to do
25 something like that?

1 A. Do --
2 Q. Because you suggested --
3 A. Do something like what, sir?
4 Q. That board.
5 A. Well, I outlined my testimony to him probably -- or
6 my conclusion probably weeks, several weeks before that.
7 Q. Well, approximately, ballpark. This case was
8 supposed to go to trial originally in, what, in August?
9 A. Well, actually --
10 Q. Is that the date you had on your calendar?
11 A. It was supposed to go to trial in August, and then it
12 got --
13 Q. Continued.
14 A. Moved ahead, yes, sir.
15 Q. Short continuance?
16 A. Yes, sir.
17 Q. Until September, what, 14th?
18 A. Right. And those results were prepared to be ready
19 to go to trial in August, the results.
20 Q. Okay.
21 A. But, but, keeping in mind that the trial date was
22 changed, it was no longer urgent to prepare the exhibits.
23 Q. Yes, sir. Yes, sir. But the concept was in place to
24 do it before -- so that you could have done, testified in
25 the August trial?

1 A. Oh, yes, sir, there's no question of that, yes, sir.
2 Q. Thank you. You were well-prepared?
3 A. Oh, yes, sir.
4 Q. Would you agree that most all cases of asbestos
5 exposure involving lung cancer include cigarette smoking?
6 A. That's sort of a yes and no answer.
7 Q. Go ahead.
8 A. Okay.
9 Q. Flesh it out as you think it's fair.
10 A. Right. If you -- there are studies that have
11 individuals that were exposed only to asbestos. When you
12 consider only those individuals, there's a -- there's
13 clearly an elevated risk of obtaining lung cancer.
14 The problem is the way most of these studies
15 were conducted with individuals working in various
16 occupations, most of those individuals also smoked. So it
17 becomes difficult to find individuals that were exposed to
18 asbestos that did not smoke.
19 But when you do find them, you find a clearly
20 elevated risk.
21 Q. Okay.
22 A. Yes. I'm through.
23 Q. So the bottom line is that most people who come down
24 with lung cancer with asbestos exposure were smokers?
25 A. And that's only because most people --

1 Q. Sure.

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2 A. Let me finish. Let me finish.
3 Q. Do me this favor, I'll let you say anything you want.
4 If you could please answer my question directly, and then
5 you can follow it up with whatever you want.
6 MR. McLAUGHLIN: Your Honor, I think the
7 witness ought to be permitted to answer the question.
8 THE COURT: The question is pretty
9 straightforward; that is, do most people who come down with
10 asbestosis also have a history of smoking, yes or no?
11 MR. COFER: Was it asbestosis or lung cancer?
12 THE COURT: Excuse me, lung cancer.
13 MR. SMITH: Yes, sir.
14 A. All right. That's true.
15 Q. That's okay. Just a second. I'm going to let you.
16 That is true, right?
17 A. Yes, sir. And I think I --
18 Q. Okay. Now, that's okay.
19 Now, saying anything you want.
20 A. And that's because most people that work in
21 industries that involve asbestos were smokers.
22 Q. Does that cover it?
23 A. And that covers it.
24 Q. And you think it's based on that, as you view it,
25 it's a coincidental finding?

1 A. Well, I'm -- I tried to point out that asbestos is an
2 independent risk factor for lung cancer, and that's
3 established by looking at individuals that do not smoke,
4 also get lung cancer when they are exposed to asbestos
5 compared to nonsmokers, nonexposed asbestos individuals.
6 Q. How many times have you testified, Dr. Bradley,
7 approximately?
8 A. In all cases?
9 Q. Yes, sir.
10 A. Probably 25 or 30 times.
11 Q. In trial?
12 A. Yes, sir.
13 Q. Approximately how many times in depositions?
14 A. Probably another 25 or 30.
15 Q. You gave me the because, and that's fine.
16 But my question, what I really wanted to ask
17 you is: Do you believe it's coincidental that people who
18 have asbestos exposure and come down with lung cancer were
19 smokers?
20 A. Well --
21 Q. Just do you have an opinion on that?
22 A. Yes, I do.
23 Q. Okay. And that opinion is?
24 A. That those, those factors act independently.
25 Q. No, that wasn't really -- that means it's

1 coincidental?
2 A. Well, then, it would be coincidental.
3 Q. Okay.
4 A. For example, if they act independently, then it would
5 be a coincidental incidence.
6 Q. That's the end of it; it's a coincidence?
7 A. No, the end of it is they are independent, which
8 leads to the fact that you will observe lung cancer rates
9 in people that are exposed to both asbestos and smoking at
10 a higher rate than either one individually.

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11 Q. Help me. Do you have an opinion as to whether or not
12 it's a coincidence?
13 A. I tried to explain to you --
14 Q. I understand, but it either is a coincidence in your
15 mind or it isn't, I believe.
16 And if you don't have an opinion, I accept
17 it.
18 But do you have an opinion as to whether or
19 not it's a coincidence?
20 A. And I tried to explain to you that these are
21 independent risk factors and --
22 Q. And that's your answer?
23 A. That's my answer, yes, sir.
24 Q. And in fairness, to both of us, that's as close as
25 you can come to the answer to that question about being

1 coincidental?
2 A. Yes.
3 Q. Okay. I want to -- I want us to try to understand
4 the numbers we have, that these are your calculations, is
5 that right?
6 A. Which? Which numbers, sir?
7 Q. Fair question.
8 When you arrived at the 1.59 number.
9 A. Yes. That's partly my calculation, that's correct.
10 Q. And who else was involved in it?
11 A. Well, that number was my calculation.
12 Q. Okay.
13 A. But -- but we have confirming evidence that that
14 calculation is correct.
15 Q. Do you want -- say anything you want.
16 MR. McLAUGHLIN: Objection, Your Honor.
17 THE COURT: Well, his responsibility is to
18 respond to your questions; not to say whatever he wants to.
19 MR. SMITH: I don't want to --
20 THE COURT: I have enough trouble running
21 this case without people just talking about what they want
22 to, without the benefit of a question.
23 MR. SMITH: Would the court reporter please
24 read my question back to him? I'll repeat -- I can repeat
25 it. It's a long question.

1 Q. You and someone else prepared a report or you -- it's
2 your report?
3 A. It's my report.
4 Q. Okay.
5 A. And I did all the calculations that appear in that
6 report.
7 Q. Okay. That's what I wanted to ask.
8 A. Yes.
9 Q. And you arrived at a conclusion of a -- of 1.59 being
10 the last number, is that true?
11 A. Of being the relative risk for a cohort of
12 individuals with smoking histories like Mr. Tompkin having
13 a relative risk of obtaining lung cancer.
14 Q. And when you say 1.59, that in lay terms means what?
15 A. Well, the 1.59, first of all, was not statistically
16 significant.
17 Q. That -- and you can say it twice if you want.
18 But --
19 A. It's not statistically significant.

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20 Q. Yes, sir. Does it mean anything else when you come
21 up with 1.59?
22 A. Well, if it's not statistically significant, what it
23 means is you cannot distinguish that rate, the rate in the
24 former smoking cohort that I had, from the never smokers.
25 Even though it might be elevated, it could have occurred by

1 chance.
2 Q. Let me ask this question: If we were to just be
3 talking around the coffee table and one of us said to the
4 other one that there's an increased risk of 1.59, before
5 someone else at the table said, "Hey, that's not good
6 enough to even talk about," what would that person be
7 trying to communicate when they used the number 1.59,
8 please?
9 MR. McLAUGHLIN: Objection. Calls for
10 speculation.
11 THE COURT: No, overruled. That's --
12 A. Well, around a coffee table, I know that would not
13 make any difference to me. I would still want to know the
14 circumstances where the number arose.
15 But so your question is?
16 THE COURT: Doctor, let me try this.
17 You've used the number 1.59. I gather that
18 you engaged in a series of calculations that had not been
19 demonstrated to the jury that resulted in the 1.59.
20 You just didn't look at all these summaries
21 and say, bingo, 1.59. I assume you had to engage in
22 calculations?
23 THE WITNESS: Yes, sir, you are correct.
24 THE COURT: And have you demonstrated those
25 calculations to the jury to this point?

1 THE WITNESS: I've demonstrated the
2 calculations to Mr. Smith in my deposition.
3 THE COURT: Well, I'm not asking about the
4 deposition.
5 I'm asking about to this jury.
6 THE WITNESS: Well, I described how it was
7 done. I described how --
8 THE COURT: Could you go to the paper and
9 draw a bunch of numbers and come up with 1.59 and show us
10 how you got the 1.59?
11 THE WITNESS: Not -- well, I can show you
12 from the information that I gave Mr. --
13 THE COURT: I'm not asking about Mr. Smith.
14 Can you tell the jury, can you go to the
15 board and say "These are the numbers I used and the result
16 is 1.59"? Can you do that?
17 THE WITNESS: You can't do it that simply
18 because it's a complex formulation to arrive at the number.
19 There's adjustments that are made with the method of
20 computation. So it's --
21 THE COURT: So we are reduced to taking your
22 word for it as opposed to you demonstrating to us how you
23 got there?
24 THE WITNESS: No, I demonstrated that I
25 took -- that it's described ratios, but we have to do

1 what's called an age adjustment to these values.

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THE COURT: If you were teaching a class, would you go through some process on the blackboard or in a notebook or something to show how you got to 1.59?
THE WITNESS: Well, I could show how --
THE COURT: No. No.
Would you do it with a class or would you just say "Take my word for it"?
THE WITNESS: No, I would show them the computer generated --
THE COURT: We are in a class; can you show us now how you got the 1.59?
THE WITNESS: I can show you the computer output from the program that gave the 1.59.
THE COURT: We are down to a computer program that gave the result?
THE WITNESS: Yes, sir.
THE COURT: How much information do you give the computer program to get that?
THE WITNESS: You put in the information from the ACS study which consisted of the cohort of individuals.
THE COURT: Your 1.59 then is dependent upon the accuracy of somebody else's study?
THE WITNESS: Well, it's depending on the accuracy of the American Cancer Society study.

THE COURT: That's what I'm saying.
THE WITNESS: Yes, sir.
THE COURT: It's depending upon the accuracy of their review?
THE WITNESS: Yes, sir, of their compilation.
THE COURT: You didn't produce the information. You used what the American Cancer Society had produced and then you, in some fashion, put that into a computer and the answer was 1.59?
THE WITNESS: Yes, sir.
THE COURT: Okay. Thank you.
BY MR. SMITH:
Q. And for you to do that, use that method, Dr. Bradley, you would have to use the system that you were using properly?
A. Yes, sir.
Q. And it would have to be a system that would work for the purposes of this trial, is that true?
A. Yes, sir.
Q. Okay. And when we say -- let me see if I'm understanding something, even though what I'm going to say you will classify statistically insignificant.
If I were to say to Mrs. Tompkin that David was in a cohort where his odds of dying from lung cancer would be 1.59 times greater than the other people in that

cohort, would I be in the ballpark with lay language in indicating what that number means, please?
A. Well, that's what the number means, assuming it was a valid representation of that ratio.
Q. So if I were with her here or at home at her coffee table, that would be in the ballpark of accuracy?
A. But --
Q. Even though it's statistically insignificant?
A. But the statistically insignificant is important.
Q. I know, and you've told us about it and you'll be

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11 able to again.
12 But that's excluding that, that's what we
13 would be saying to each other?
14 A. Well, I would be telling her that that was no
15 increased risk.
16 Q. Absolutely. I know you would. And you have.
17 A. And exactly.
18 Q. Oh, one question along that line.
19 Nothing to do with that number indicates that
20 the smoking was not a cause of his death, does it?
21 A. That's -- that number refers to cohorts of
22 individuals and --
23 Q. But -- okay.
24 A. And as I pointed out, based on the epidemiological
25 principles, since there's no association, that means you

1 cannot have causation.
2 Q. Let me ask this question: Can you get on that
3 witness stand and testify under oath that to a reasonable
4 degree of certainty, David Tompkin's smoking was not a
5 cause of his death?
6 A. We don't know what the cause of his lung cancer was.
7 Q. So your answer to that would be that you can't do it?
8 A. You -- nobody knows what the cause of his --
9 Q. Including you?
10 A. Including me.
11 Q. Now, would the number before it would be adjusted
12 before whatever mechanism would be possible, would be
13 required, what would your best estimate be as to what that
14 number would have been before it was adjusted and wound up
15 at 1.59?
16 A. I don't know without looking at it.
17 Q. Is it conceivable in your mind that it could have
18 been two or greater?
19 A. It could have been, but the age group of the cohort
20 for Mr. Tompkin was higher than the age group for the never
21 smokers, so, therefore, it would have to be adjusted
22 downward would be my guess.
23 Q. I'm not quarreling with your adjustments, but before
24 it was adjusted, is it in your mind conceivable that it
25 would have been above two?

1 A. It's conceivable.
2 I have no idea what it is.
3 Q. Okay.
4 MR. SMITH: Your Honor, may I approach the
5 board again?
6 THE COURT: Yes.
7 Q. Dr. Bradley, what would be required of a person to,
8 before they would be included in this cohort, this American
9 Cancer Society study, what would some of the requirements
10 be, sir?
11 A. You mean to be in the study at all?
12 Q. Yes, sir.
13 A. Well, they had to want to participate in the study.
14 Q. Okay. Want to participate.
15 A. Right.
16 Q. That crayon is not working.
17 Okay, sir. What else would be required?
18 A. Well, that's basically it. They went out and
19 recruited individuals into the study.

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20 Q. Would they put people in that study who were dead?
21 A. No, sir. You had to be alive.
22 Q. You had to be alive?
23 A. At the start of the study, yes, sir.
24 Q. What other requirements would there be, if any, that
25 come to your mind?

1 A. I think that's basically it.
2 Q. Would someone who was diagnosed with lung cancer be
3 permitted to go into that study?
4 A. Yes. I think as long as they were alive,
5 participating, they just simply asked them a questionnaire.
6 Q. When you say you think, is that -- have you done any
7 research on that topic?
8 A. Well, they didn't ask if they had that disease at
9 that time, so I would not suspect they would know.
10 They wanted individuals to go in the study
11 that were basically disease-free, but whether that was
12 assured or not, you can't be absolutely sure, but that's
13 probably generally true.
14 Q. What would a person have to do to go into the study?
15 A. Well, they went out and recruited individuals into
16 the study.
17 Q. And what would they then do? Fill out the forms at
18 their house?
19 A. They would get with an individual, fill out the
20 forms, that's correct.
21 Q. Do you think they would go to a hospital to get
22 people to go into the study, that were being treated for
23 cancer?
24 A. No, sir. My understanding was they chose individuals
25 that were associated with -- I'm not saying somebody didn't

1 work at a hospital, but I'm saying I do not believe they
2 went to a hospital to recruit.
3 Q. They were associated with people doing what,
4 Dr. Bradley?
5 A. They were individuals that were recruited.
6 Q. No. No.
7 Where did they go to find them?
8 A. The American Cancer Society put out an indication
9 they wanted individuals in the study so they actively
10 recruited as many people as they could get.
11 Q. And how did they select them? Did they -- just
12 anybody in the country?
13 A. If you wanted to be in the study, you could be in the
14 study, yes, sir.
15 Q. And what did you have to do to be in the study,
16 please?
17 A. You had to commit to filling out the form and then
18 being subjected to follow-up procedures.
19 Q. And how would you get the form and how would you
20 return it?
21 A. You would agree to be in the study, and they would
22 either mail the form to you or send the form to you, and
23 you'd send it back in.
24 Q. How would you indicate you agreed to do the study?
25 A. By completing the form.

1 Q. And how did you receive the form?

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2 A. The form could either be picked up or mailed to you.
3 Q. And to be picked up where?
4 A. At one of the sites where -- they had sites all over
5 the country where they had these forms.
6 Q. And so, what do they have; signs with the sites, do
7 you want to go in our study?
8 A. No, they didn't do it that way.
9 They tried to recruit through individuals
10 that were associated with the American Cancer Society that
11 knew other individuals. They did a lot of that kind of
12 recruiting, and they would go to various places to get as
13 many people involved as they could.
14 Q. This study wasn't exactly a -- it wouldn't be the
15 study that you would use to have the perfect picking of
16 your sample group as an example?
17 It wasn't totally at random, was it? Didn't
18 that affect this randomness a little?
19 A. No study -- it's impossible to run a study of that
20 nature at random.
21 Q. Yes, sir. But wasn't there some discussion following
22 that study regarding its randomness and its sampling, or
23 not?
24 A. Well, the study does represent individuals that are
25 more educated than the average population.

1 Q. But wasn't -- weren't there also those people who
2 questioned it or criticized it on the basis of its
3 randomness?
4 A. I don't recall that.
5 Q. To do a sampling, you want to have it be as random as
6 possible?
7 A. No, you want it to be as representative as possible.
8 Q. And being representative, if you are doing the entire
9 United States population, you want to have it -- what is
10 the word?
11 Random doesn't apply if you want to represent
12 the entire population?
13 A. Well, random samples are used sometimes to get at
14 representative samples. But representative samples are
15 what you are really ultimately after.
16 Q. And but like a true random sample, you might do one,
17 41, by numbers, would that be a way to approach something
18 like that?
19 A. That's called a systematic sample. That may or may
20 not lead to a random sample.
21 Q. But this, this study was, the American Cancer
22 volunteers went out to get people, is that correct,
23 society?
24 A. That's correct.
25 Q. Will you accept question mark with respect to whether

1 or not they would be apt to pick up a lot of people who
2 were diagnosed with lung cancer prior to entering the
3 study?
4 What do you think?
5 A. I think that they wanted individuals that were
6 in -- they were asking in the study, and when -- they
7 wanted the people of course they want.
8 They wanted people that were not deceased,
9 but they wanted people that they could follow for a period
10 of time to see what disease process developed.

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11 Q. And a period of time would be for how long?
12 A. Six years.
13 Q. Was that their goal, to get people into the study
14 that they could have for six years?
15 A. Yes, sir.
16 Q. And the average length of survival of a person
17 diagnosed with lung cancer would be about what, sir?
18 A. I don't recall. It's short.
19 Q. Less than six, isn't it?
20 A. It's less than six years, yes, sir.
21 Q. So I want to put question mark. Is it fair if I put
22 that topic up here, question mark, people diagnosed with
23 lung cancer?
24 A. Well, I'm sure there were people that had lung cancer
25 that entered into the study.

1 Q. And had been diagnosed and told the Cancer Society
2 that?
3 A. I don't know that that's true.
4 Q. There would be people walking down -- one of us in
5 this room could have lung cancer right now?
6 A. That's true.
7 Q. And not know it?
8 A. That's correct.
9 Q. I understand that.
10 A. Right.
11 Q. I'll just put question mark.
12 And I'm going to try to use a phrase that the
13 doctors use all the time or a mark, DX for diagnosis, is
14 that okay?
15 A. Yes, sir.
16 Q. Now, I want to ask you this question: Did you, by
17 the way, examine Dr. Haas's records?
18 A. I looked at a report of Dr. Haas's, but it's been a
19 long time since I saw that.
20 Q. Do you recall his pack years that he had?
21 A. No, sir, I do not.
22 Q. Okay. And I want to say this to you, I want to put
23 this in context, because the numbers you use would allow
24 for it so I don't want to -- I'm not criticizing you in
25 that feature, but I'm also trying to indicate that the

1 range you used would encompass what Dr. Haas had.
2 That's all I'm saying on that, okay?
3 A. Okay.
4 MR. SMITH: Now, if I may approach the easel
5 again, Your Honor.
6 THE COURT: Yes.
7 Q. You put David Tompkin in an age group -- or I'm using
8 "age" in the context of -- I really should say distance
9 group, from how long they had been off cigarettes, is that
10 correct?
11 A. Yes, sir. The length of abstinence from smoking
12 prior to his death.
13 Q. But it was 27 to 35, is that correct?
14 A. I'd have to check. I believe that's correct.
15 Yes, sir, that's correct.
16 Q. Now, I have two questions for you on that.
17 David Tompkin, when was he diagnosed with
18 cancer?
19 A. In, if I recall correctly, it was 1992.

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20 Q. And how many years was that after he quit smoking?
21 A. That was approximately 27 years.
22 Q. So that would mean that he would be in the group
23 going in at the -- when he was diagnosed with lung cancer,
24 or at least there's a very good chance that he was, is that
25 true?

1 A. Yes, sir.
2 Q. And that means there's a very good likelihood that he
3 couldn't have went in at that time, with that group, if
4 he's diagnosed with lung cancer. And the understanding of
5 the medical community is generally those people won't
6 survive six years, he wouldn't be eligible for that cohort
7 probably?
8 A. He --
9 Q. Is that a fair statement?
10 A. Fair statement he might not have been in the American
11 Cancer Society study, yes, sir.
12 Q. Okay. There's another feature to it.
13 You picked the cohort that had eight years in
14 it, is that correct?
15 A. That eight year range, yes.
16 Q. And normally they were six, is that correct?
17 A. Well, no, no. I picked a range of years that would
18 encompass eight, but the cohort lasted -- I mean, the study
19 lasted six years.
20 Q. Yes, sir.
21 A. And that has really nothing to do with picking this
22 range.
23 Q. Well, maybe it doesn't, but I want to ask you a
24 question on it anyway.
25 And before I do that, I want to ask this

1 question: The American Cancer Society study was to
2 determine how many or it was based upon obtaining facts as
3 to how many people died during the six years they were in
4 the cohort?
5 A. Correct.
6 Q. From lung cancer?
7 A. Well, from any cause.
8 Q. Okay. They were -- they were a variety of causes
9 but --
10 A. It could be cancer, it could be any cause.
11 Q. Forgive me. Forgive me. That's right. You are
12 absolutely right.
13 But for our purposes here, they would have to
14 die within the six years to be counted?
15 A. As a death.
16 Q. And that's what you used this to count for, is that
17 right?
18 A. Death.
19 Q. You used the deaths?
20 A. And also individuals that did not die. You've got a
21 ratio of individuals that died.
22 Q. Yes, sir. You come out dead or alive in this study?
23 A. That's correct.
24 Q. I mean, that's a blunt way of saying it, but I want
25 to be blunt because I want us to understand it.

1 That's all it measured; that at the end of

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2 the six years, did you come out, you were alive; if you
3 didn't come out, you were dead, and they put you in those
4 two categories?
5 A. Yes, sir.
6 Q. Okay. Now, these may be picayune but I want to ask
7 you this: When we go 27 to 35, we have eight years, is
8 that correct?
9 A. Yes, sir.
10 Q. Now, it's your understanding of the epidemiology of
11 this, are you an epidemiologist?
12 A. I consider myself one, yes, sir.
13 Q. Have you ever had any schooling in it?
14 A. Well, I taught in the School of Public Health and I
15 taught epidemiology.
16 Q. Okay. But you don't have a doctor's degree in
17 epidemiology?
18 A. No, sir.
19 Q. But you have knowledge of it, and I'm not quarreling
20 with that.
21 A. Yes, sir.
22 Q. Okay. Now, it's my understanding that it's your
23 testimony the longer you are away from smoking cigarettes,
24 the greater it graphs down?
25 A. Yes, sir.

1 Q. So that means that the graph is lower for someone who
2 is 34 or 35 than for someone who's 33?
3 A. Yes, sir.
4 Q. So that means that in this group that you selected,
5 it is done to decrease David Tompkin's number?
6 I'm not saying it was done for that purpose,
7 but the end result of it is it decreases his number rather
8 than raising it?
9 A. That's incorrect.
10 Q. Well, then --
11 A. Because we have on the other end, higher rates at the
12 27, and the interval is chosen such that he's right in the
13 middle. So the average then will represent David Tompkin.
14 Q. Well, let's -- give me a minute on that, would you
15 mind?
16 He dies at 30.5 is what you put?
17 A. He died in 1996, he was about 30 and a half years,
18 yes, sir.
19 Q. The date in '96?
20 A. I don't know.
21 Q. If I was to tell you it was February 12th, '96, would
22 you accept it?
23 A. Yes, sir, I would.
24 Q. I will ask Jocelyn his birthdate to make sure I'm
25 right on this.

1 His birthdate was December 28th, 1934?
2 A. That's correct.
3 Q. So and he dies on January 12th?
4 THE COURT: February.
5 A. No.
6 Q. February 12th. I apologize. That's correct.
7 So he dies, what did I say, December 28th?
8 There's three days in December. What, 31 in January?
9 A. The last I remember, yes, sir.
10 Q. 34 -- me, too -- and he died on February 12th. So

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11 that's 46 days.
12 And we are hair splitting here when we start
13 talking 1.59s and things like that, okay? So just forgive
14 me for that.
15 A. I think we are hair splitting, yes, sir.
16 Q. And we are. And I'm not quarreling with you.
17 But you are hair splitting. You don't
18 consider what you are doing hair splitting?
19 A. Absolutely not.
20 Q. Absolutely. Okay.
21 If we say 49 days, that's truly not a half
22 year, is it?
23 A. Well -- no, sir.
24 Q. Just in fairness?
25 A. That's true.

1 Q. Yeah. So I mean in fairness to it, it's closer
2 to -- it's probably pretty close to 3.1, if you were to
3 round it, but I will accept your math on that.
4 A. I -- I'd have to run it. I don't know.
5 Q. Does 3.1 sound pretty close, 49 over 365?
6 A. 3.11, roughly that.
7 Q. Okay. So it's really 3.1?
8 A. Yes.
9 Q. And these numbers do become important when we factor
10 it out, isn't that true?
11 A. Well, we are -- but, you know, they only measured it
12 to the nearest year for the individuals in the study. And
13 now that's as close as we can get, so we have to go to the
14 nearest year with him.
15 Q. Well, you went to 30.5 is the only reason I was
16 saying that. You used that?
17 A. I think that was the average was 30.5. The average
18 for that group was 30.5.
19 I think I said his was 31 years since he had
20 quit smoking.
21 Q. You --
22 A. His, his length of time since he had quit smoking was
23 31 years at the time of his death. He quit smoking in
24 1965; he was deceased in 1996.
25 Q. I agree with what you are saying.

1 A. Okay. So I don't understand the point of his age
2 when we are talking about the years he quit smoking.
3 Q. Please bear with me. You let me say anything I want
4 if I let you say anything you want, is that all right?
5 THE COURT: Well, just ask questions, please.
6 Q. If this is 33 instead of 35, you lose the people who
7 had quit smoking for 34 and 35 years, is that true?
8 A. Yes, sir.
9 Q. And when you lose the people on that end at 34 and 35
10 years, I would expect, if what you are saying is true about
11 it graphing down, it's going to indicate a lower death rate
12 than you would get with the people who are at 27 and 28?
13 A. Well, yes, sir, that's correct.
14 Q. So that does work to the disadvantage of the
15 Tompkins, that counting those last two years?
16 A. No, sir. No, sir. The point is Mr. Tompkin had 31
17 years of abstinence at the time of his death.
18 Q. 30.1?
19 A. No, sir. No, sir. At the time of his death, he quit

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20 in '65, we are not talking about when he was born. He quit
21 in 1965. He died in 1996.
22 THE COURT: Well, if he died in 1995 would be
23 30 years?
24 THE WITNESS: He died in 1996.
25 THE COURT: I understand that. If he died in

1 1995, you'd say 30 years?
2 THE WITNESS: Yes, sir.
3 THE COURT: Because he's some few days into
4 1996, you add a whole year, I gather?
5 THE WITNESS: Well, that's the --
6 THE COURT: Do you or don't you add a whole
7 year?
8 THE WITNESS: Yes, sir. Yes, sir.
9 THE COURT: If he died on December 31st,
10 1995, you'd say 30 years?
11 THE WITNESS: Yes, sir.
12 THE COURT: If he died on December 31st,
13 1996, you'd say 31 years? Anytime he died in 1996, you are
14 going to say 31 years?
15 THE WITNESS: But we don't know the exact --
16 THE COURT: Is that right or wrong?
17 THE WITNESS: Yes, sir.
18 THE COURT: Thank you.
19 BY MR. SMITH:
20 Q. And 30.1, if he dies February 12th, that's the same
21 thing as 43 over 365, it's still 30.1?
22 A. But wait a minute. We don't know the day he quit
23 smoking. That's the relevant point.
24 What day did he quit smoking in 1965?
25 Q. Okay. Let me -- and that's a fair statement.

1 A. I think so.
2 Q. It is. You know what? And I agree with you, I do, I
3 do. But I do want to get this to some accuracy.
4 So you are saying 30.5 is the number, okay?
5 A. Let me tell you what I'm telling you the 30.5 is.
6 You are throwing a lot of numbers around here, but the 30.5
7 represents the average length of time individuals in that
8 cohort were abstinent from smoking prior to their death
9 with lung cancer. 30.5.
10 Q. Okay.
11 A. Now, David Tompkin quit smoking in 1965. We do not
12 know the date. We do not know the date.
13 Q. So --
14 A. So if he quit mid-year 1965, and even if he quit on
15 January 1st, 19 -- of 1996, that would be 30.5 years.
16 Q. And I'm going to give you that.
17 A. So I'm exactly on his cohort.
18 Q. I'm going to give you that. I mean, that's fine. I
19 don't quarrel with you.
20 A. Okay.
21 Q. Or at least I don't have the time or the inclination
22 right now.
23 But I want to accept that, but I am asking
24 you this question from your end.
25 When the groups are six years that they

1 select and they measure from is, and for instance, let me

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2 just -- I'm going to make this ridiculous, but when we
3 start to 1.59 and things of that nature, if this read 27.2,
4 instead of saying 35 to 50 --
5 A. Yes, sir.
6 Q. -- would that reduce in your opinion the 1.59 number?
7 A. It probably would, yes, sir.
8 Q. And the reason, why is what?
9 A. You'd have longer period of time of abstinence on the
10 average for the group. The average would jump way up.
11 Q. And the further you get out in time, the lower the
12 number gets, in your judgment?
13 A. Right. But that would not be representative of
14 Mr. Tompkin.
15 Q. I understand. I understand.
16 But if that theory would apply if we went
17 from 27 to 50, wouldn't you be willing to say it would
18 apply also if we go from 27 to 35 instead of 27 to 33?
19 A. But if I go to 27 to 35, then the average length of
20 abstinence of that group is going to be less than 30.5 and
21 would be less than the length of abstinence for
22 Mr. Tompkin.
23 Q. If you go to what?
24 A. 27 to 33 --
25 Q. Yeah.

1 A. -- that average will be less than 30.5 years for that
2 group of abstinence. And that would be less than
3 Mr. Tompkin's length of time.
4 We want to mirror his group as near as
5 possible.
6 Q. Well, then, let me, if you really want to -- I
7 don't -- I respectfully differ with you, but that's my
8 problem.
9 THE COURT: Just ask him questions, please.
10 Q. But if you were to just go to 27 to 34, and make it a
11 year longer, that wouldn't violate what you are saying you
12 are trying to do, would it?
13 A. Yes, it would.
14 Q. Why?
15 A. It would lower an average of a year so it would be at
16 29.5.
17 Q. Pardon? Why do you have to have eight years there
18 rather than six?
19 A. I could have six years. I chose eight years to get
20 sufficient individuals into the cohort.
21 Q. But I'm asking you just respectfully if you could do
22 something that mirrored the cohorts --
23 A. If I could do something that mirrored the cohorts, I
24 would have taken people that were exactly 31 years, if I
25 had enough of them and had exactly everything.

1 As large as that study is, it's difficult to
2 get people that were exactly on --
3 Q. Dr. Bradley, then you are saying you would have taken
4 31 years; 28 going in, 34 coming out?
5 A. No, no. I would have taken 31 only, if I could get
6 it.
7 Q. Well, let me ask you to just do this for me. Just
8 let me ask you to do this for me.
9 You've testified in depositions and trials
10 how many times?

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11 THE COURT: He's already said that, 25 to 30.
12 THE WITNESS: Each. So, you know, 50 to 60
13 times.
14 Q. Okay. So you do know the process?
15 A. Everytime I think I know it, I learn something new.
16 Q. Well, all I'm asking from you on this one is
17 to -- I'm not asking you to learn it, but I'm asking you to
18 see if you'll do this.
19 The cohorts are six years, right?
20 A. No. The -- what the six years is is the length of
21 the study.
22 Q. For each person? Each person that goes into it is
23 into a six year group?
24 A. Into a group that will last at most six years, unless
25 they leave the study, either due to death or some other

1 reason.
2 Q. Correct. And I'm asking you to pick six years for
3 this one so that that matches, because we are looking at
4 David Tompkin.
5 Will you do that?
6 A. If I was going to use six years, then I would have
7 used an interval six years around the 31.
8 Q. Let me ask you this question. Maybe I'm being
9 unfair.
10 Can you discuss this with me on the basis of
11 using six years, or is that impossible?
12 A. We can, if you want to do that.
13 Q. I'm asking. I appreciate it very much.
14 A. Yes, sir.
15 Q. And we can take two groups, whatever you would want,
16 if we could take 20 -- 28 to 34?
17 A. Yes, sir. That would be the choice.
18 Q. Or 27 to 33.
19 A. That would not be the choice.
20 Q. Okay. Here's the point I want to ask you right at
21 the get-go: We are trying to measure what happened to
22 David Tompkin, right?
23 A. Yes, sir.
24 Q. Now, it's true that probably David Tompkin wouldn't
25 have been accepted for that group because he already had

1 been diagnosed with lung cancer, the 28 to 34 group, that's
2 the probability, isn't it?
3 A. The probability is he wouldn't have been in the study
4 to begin with.
5 Q. Okay. Now, having said that requires two things to
6 be recorded in the study as far as I can tell: The person
7 can't have lung cancer going in, and they can't come out
8 alive or they are not counted as a positive lung cancer
9 death, true?
10 A. No. No. They can't be diagnosed --
11 Q. Yes.
12 A. -- with the disease going into the study.
13 Q. I'm corrected, yes.
14 A. Some are already going to have the disease in the
15 study, we know that.
16 Q. Yes, sir. I agree. I agree.
17 So we will put no diagnosis. It requires no
18 diagnosis and death to be counted?
19 A. No. Then they don't have to die, they just have to

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20 be -- abstain from smoking for a period of 28 to 34 years.
21 Some of those will die, some of them won't.
22 Q. Yes, sir. But to be counted as a positive, they have
23 to die?
24 A. Well, to be counted as a death. I don't know the
25 word "positive."

1 Q. To be counted as a death.
2 You have people come out dead or alive,
3 right? To be one of the ones come out as dying from lung
4 cancer, you have to have a death?
5 A. Yes, sir, that's correct.
6 Q. Now, ask me if this is fair or not fair: That means
7 that the only people counted as deaths for this are people
8 that both were diagnosed and died within that six year
9 period?
10 A. Well, they had to at least die from lung cancer. I
11 don't know -- and at some point it would be diagnosed with
12 lung cancer, yes.
13 Q. And we believe probably to go in, it would have been
14 during that six year period?
15 A. It would have been during the period they were in the
16 study, yes, sir.
17 Q. And don't you think, when you back away from it and
18 just absorb that a minute, don't you think that reduces the
19 number of people that are going to be considered to die
20 from smoking because to die from smoking, you do not have
21 to be diagnosed and die within any given period after you
22 are selected in a program?
23 A. Well, I don't understand.
24 Q. Let me see if I can do a better job.
25 Say I'm going to a grocery store, and I agree

1 to go in the program, okay? Somebody is there with a table
2 or whatever, or however they do it, or somebody at the
3 American Cancer Society is a friend of mine and I say,
4 sure, I'll do it.
5 Okay?
6 A. Okay. Sure.
7 Q. Now, if I go in at that day, for me to be counted as
8 a positive, I have to have those two events, diagnosis and
9 death, within six years?
10 A. Wait. To be -- wait a minute.
11 Q. Counted as a death?
12 A. You are enrolling in the study at the beginning?
13 Q. Yes.
14 A. So what are you saying now?
15 Q. For me to be counted as a death, those two things
16 have to happen, I have to be diagnosed and death -- and die
17 within the study probably?
18 A. Yes, sir.
19 Q. Now, you are saying that that indicates how many
20 people per -- per what?
21 A. Well, you can express it in different ways. Usually
22 it's expressed as a rate of person deaths per hundred
23 thousand.
24 Q. Okay. And that's what's used to determine that,
25 right?

1 A. How you express the rate of death from.

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2 Q. And all I'm suggesting to you is there would be some
3 people who wouldn't -- they might die from lung cancer, but
4 they might not die within that period, have both of them,
5 qualify, they would be rejected in other words?
6 A. Well, they would have to die after the period, not
7 during the period.
8 Q. During the six years they would have to -- they would
9 have to die after the period to not appear in it?
10 A. They would have to die during the study, but not
11 unless they did not die during the period.
12 Q. Unless they had lung cancer, they couldn't go into
13 the study probably?
14 A. Yes. Of course, this affects not just the smoking
15 group, the smoking cohort, but it affects the never smokers
16 also, so it's not just a one-sided --
17 Q. Absolutely. But that's where you get your ratio
18 from?
19 A. Right. In other words, that's where you have the
20 basis -- it's subjected to the same constraints that you
21 are talking about for the smoking group, the nonsmoking
22 group has those same constraints.
23 So in a sense those things are adjusted out
24 when you take the ratio.
25 Q. Well, this isn't my specialty and I'm going to be the

1 first to admit it, but I want to ask you this question: It
2 would seem to me what you just said would cause there to
3 appear to be less deaths per hundred thousand for smokers
4 because if there were smokers counted in the group who
5 didn't die or smokers -- while they were in the group or
6 smokers who couldn't get into the group because they had
7 been diagnosed with lung cancer, they couldn't be counted
8 either, it would seem to me it would bend it that
9 direction?
10 A. Well, it affects the never smokers, too. There would
11 be never smokers who had lung cancer that weren't allowed
12 into the study, and then there would be some of those that
13 may have been diagnosed that didn't die.
14 Q. Absolutely.
15 Let me ask you a question: What is
16 the -- I've read that approximately 90% of those people,
17 those men at any rate, who die from lung cancer, were
18 smokers.
19 Would you agree with that figure?
20 A. I don't recall what the figure is.
21 Q. One way or the other in your studies? You have no
22 opinion on that?
23 A. I -- I just haven't looked at it recently so I can't
24 say.
25 Q. Okay. If it was 90%, that would -- that would still

1 indicate that the number would be reduced rather than
2 raised by what we've just been talking about?
3 A. No. Not necessarily. I would disagree with that.
4 Q. You do?
5 A. It would affect both parts in the same proportion.
6 Q. Well, I'm going to leave the jury to --
7 A. I mean --
8 Q. I'm not going to bore the jury with this, but I'll
9 ask them to apply their own mathematical skills to that.
10 A. Well, let me apply the mathematical skills to it, and

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11 that is if you take the same ratio of people that are out
12 in the numerator and denominator, then the end results can
13 be the same when it comes out.
14 Q. Well, let me ask a very simple question.
15 If there are more smokers barred from the
16 study than nonsmokers, the number of deaths per hundred
17 thousand from smokers is probably going to go down, is it
18 not?
19 A. No. Why are there more smokers barred than
20 nonsmokers?
21 Q. I'm not asking you to agree with that. I'm not
22 asking that question. I'll come back to that, and I'm
23 fearful of boring the jury with this, this is tedious, and
24 I'll ask you if we can cut to the chase on this issue.
25 If, if there are more smokers barred from the

1 study than nonsmokers, and if approximately 90% of lung
2 cancers are suffered by smokers, wouldn't the number of
3 deaths per hundred thousand go down rather than up?
4 A. If that were true. But --
5 Q. Yes.
6 A. But there's no reason to suspect that that would be
7 true.
8 Q. And -- there isn't?
9 A. No, sir.
10 Q. You know, that's okay. I'll ask the jury to consider
11 it.
12 THE COURT: Doctor, you indicated in your
13 earlier testimony that you believed that the people who
14 answered this or participated in this study were above
15 normal in intelligence.
16 THE WITNESS: No, I didn't say that.
17 THE COURT: Okay. What did you say then?
18 THE WITNESS: I said they had more education.
19 THE COURT: All right. Well, is there any
20 correlation that you've seen that deals with the percentage
21 of people with more education that smoked versus people
22 with lesser education that smoke?
23 THE WITNESS: No, I don't recall. At this
24 point I just don't recall.
25 THE COURT: You don't know whether there's

1 any studies out there that reflect the degree of smoking
2 based on the extent of education?
3 THE WITNESS: Yes, sir, there are studies out
4 there.
5 THE COURT: What do they show?
6 THE WITNESS: I just don't recall.
7 THE COURT: Anything further?
8 MR. SMITH: A little bit, Your Honor.
9 BY MR. SMITH:
10 Q. The study is designed to determine what, per hundred
11 thousand?
12 A. Well, the standard way of expressing it is to express
13 a rate per hundred thousand.
14 Q. And the rate of what?
15 A. Of dying from whatever disease that we are looking
16 at. In this case, lung cancer.
17 Q. Okay. Now, here's my question, another question for
18 you: Your testimony in this case is that what isn't
19 statistically significant to David Tompkin?

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20 A. The cohort of individuals that represent individuals
21 that have smoking histories similar to Mr. Tompkin's, that
22 rate of developing lung cancer is not statistically
23 significantly different from the rate that you would get
24 with a group of never smokers.
25 Q. Do you want to adjust that statement in any way?

1 A. No.
2 Q. I'm asking you that.
3 A. No, sir.
4 Q. You think that's a fair and accurate statement?
5 A. Yes, sir.
6 Q. What are we -- what is this case about? What are
7 some of the things this case is about?
8 MR. McLAUGHLIN: Objection.
9 Q. Injury-wise?
10 THE COURT: Sustained. Sustained.
11 Q. Is this case about lung cancer, as you understand it?
12 THE WITNESS: Am I supposed to answer that?
13 THE COURT: Well, there's no objection. You
14 can answer the question.
15 MR. McLAUGHLIN: All right. I'll object,
16 your Honor.
17 THE COURT: Oh, I think I'll overrule that
18 objection.
19 He can answer, to the extent that he knows.
20 A. All right. Sir, your question was?
21 Q. Is it your understanding this case is about lung
22 cancer?
23 A. Yes, sir, that Mr. Tompkin had lung cancer.
24 Q. Now, you had just testified that it was -- the
25 American Cancer Society study determined how many people

1 out of a hundred thousand got lung cancer, right?
2 A. Well, no, sir. They had the raw data, and then
3 depending on which groups you want to choose, then you can
4 determine that rate.
5 Q. Of people who got lung cancer?
6 A. Who got lung cancer, yes, sir.
7 Q. But isn't that inaccurate? Aren't they measuring the
8 number of people that die from lung cancer?
9 A. Exactly. It's --
10 Q. So what you said, what you said, it isn't how many
11 got lung cancer, it's how many died from lung cancer?
12 A. Yes, sir, you're correct. It's how many died from
13 lung cancer.
14 Q. And there are some people, as bad a disease as it is,
15 who live from it, right?
16 A. Yes, sir.
17 Q. Did your medical studies tell you approximately what
18 percent of the people that get lung cancer, live from it,
19 sir?
20 A. I don't recall the number.
21 It's a low number.
22 Q. Well, let me say, if it were to be as much as 15 or
23 20%, would you call that a low number?
24 A. I think that would be a high number.
25 A surviving or dying?

1 Q. Surviving.

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2 A. I don't believe 15 or 20% survive.
3 Q. I thought you didn't know?
4 A. I don't know.
5 Q. If you do, I'm --
6 A. I don't know.
7 Q. Okay. But let me ask you this question: Do you
8 think it's over 5%?
9 A. I just don't know.
10 Q. If there is a percentage of people who live, that's
11 statistic -- what does it take, sir, to be statistically
12 significant?
13 A. You have to -- it has to be different from the never
14 smoking group at a 95% confidence level.
15 Q. So do you think people living would be statistically
16 significant to determination of the number of people that
17 get lung cancer, including both those that live and die?
18 A. When this study --
19 Q. No, no, we will go back to it. I'll let you talk
20 about it.
21 A. This study considered only those that died.
22 Q. That wasn't my question, though.
23 MR. SMITH: Would the court reporter please
24 read my question back?
25 (Record read).

1 A. That question doesn't make any sense.
2 Q. Okay. I'll try to do better.
3 MR. SMITH: If I may approach the easel.
4 Q. My question is: If we were to take all those people
5 who are diagnosed with lung cancer, and in one group we
6 would put the numbers for those that lived and those that
7 died, in another group we would put those who died, would
8 the number counting those who live plus those who die be
9 greater than those who just die?
10 A. Well, obviously it would be greater.
11 Q. Now, you may know this or you may not, but I'm going
12 to ask you to take my word for it, unless it's wrong. Then
13 I'll be corrected.
14 This case has two counts in it. One for
15 David Tompkin's suffering while he was alive from lung
16 cancer. Okay, sir?
17 A. If you say so, yes, sir.
18 Q. It has a second count for his dying from lung cancer,
19 okay?
20 A. Okay.
21 Q. Would you agree with me that it wouldn't be fair to
22 apply the American Cancer studies measuring death to the
23 facts of a person's suffering from living with lung cancer?
24 MR. COFER: Objection, Your Honor. Beyond
25 the scope of this witness's expertise and the scope of --

1 THE COURT: He can say that, if that's his
2 position.
3 Overruled.
4 A. I don't have an opinion on that. That to me is a
5 legal conclusion.
6 Q. It is?
7 A. Yes, sir.
8 Q. Okay. You do get paid for your time involved in
9 these cases, is that correct?
10 A. Yes, sir, I do.

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Q. And you've been paid approximately how much for your time in working in tobacco-related topics for the tobacco industry, please?

THE COURT: You are talking about all he's been paid?

MR. SMITH: Yes, sir.

Q. It would be approximately what?

A. About $250,000.

(Pause).

Q. Do you ever do studies of statistical significance for a company?

A. I don't understand what you're saying.

Q. For a company making a product, do they ever have you do any statistical studies?

A. I've done statistical studies for litigation on

products, and I have done it when I was at the university for a product, yes, sir.

Q. If you were doing statistical studies for a product, and you concluded that that product had a 1.59 chance that a person who used that product would get lung cancer than a person who did not, would you bring that to the attention of the company for whom you were working?

A. You're asking me was I asked to do that or am I finding that out independently or --

Q. I'm asking you if you learned that, if you were asked to do that and you did the work, the statistical analysis and determined that.

A. And it was statistically significant?

Q. It was 1.59 which you have defined as statistically insignificant, I believe.

A. For this study.

Q. Okay.

A. Another study, it might be statistically significant.

Q. Whether it is or not, would you bring that to the attention of the company?

A. If -- yes. I mean, if I was asked to do the study, I would tell what the results are. That's what I always do.

Q. Would you encourage them to issue a warning?

MR. McLAUGHLIN: Objection, Your Honor. Calls for speculation. Beyond the expertise of the

witness.

THE COURT: Yeah, I think it does.

The objection is sustained.

MR. SMITH: That's all I have, Your Honor.

Thank you.

THE COURT: We will take the midmorning recess.

You may file out.

(Jury out).

(Recess taken)

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THE COURT: Please be seated.
You may proceed.
MR. McLAUGHLIN: Thank you, your Honor.
- - -
REDIRECT EXAMINATION
BY MR. McLAUGHLIN:
Q Good morning ladies and gentlemen.
Doctor Bradley, good morning.
A Yes, sir.
Q Mr. Smith asked you if you were being paid for your time in this case. Do you recall that?
A Yes, sir, I did.
Q And you told him that what you had been paid with respect to your work and your time on behalf of tobacco companies?
A Well, law firms representing tobacco companies.
Q Law firms representing tobacco companies?
A Indeed, sir.
Q Did that involve a number of cases?
A Yes, sir.
Q Over how long a period of time?
A Seven years.
Q Now, I think you've testified that you are a consultant now that you are a professor emeritus at the university?

A Yes, sir.
Q And as part of what you do in consulting work you testify as an expert witness?
A Yes, sir, that's correct.
Q Did you tell us on direct examination that you have testified in a number of other cases besides tobacco cases?
A Yes.
MR. SMITH: Object.
THE COURT: Overruled, the answer may remain.
BY MR. McLAUGHLIN:
Q And sir, were you also compensated for the time you put in in those cases?
A Yes, sir, I was.
Q And with respect to the breakdown of what percentage would be for plaintiffs, what percentage would be for defendants, can you tell us again, sir. What that would be?
A It is approximately 70 percent for plaintiffs and 30 percent for defendants.
Q So no matter what side you testify for you are compensated for your time?
A Yes, sir, same rate.
Q Does that have any bearing on the professional opinions you give?
A Absolutely not.
Q Any bearing on the professional opinions you've given

in this courtroom?

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2 A No, sir.
3 Q Dr. Bradley, let me take you back to paragraph 45 of
4 your report and let me ask you, and you may have a copy in
5 front of you. Let me ask you to pull it out.
6 A Yes, sir.
7 Q First, does anything you set forth in paragraph 45 of
8 your report dated May 14th, 2001, is anything inconsistent
9 with the testimony you gave here yesterday on direct
10 examination?
11 A No, sir.
12 Q Now, directing your attention, sir, to the paragraph,
13 and I think Mr. Smith wrote most of the first sentence on
14 the board but only some of the second sentence. And let me
15 read that second and last sentence of the report to you,
16 sir. And I quote.
17 "The difficulties of disentangling the
18 relationship among several factors while attempting to
19 control for confounding have been recognized in the
20 scientific community."
21 Did I read that correctly?
22 A Yes, sir, you did.
23 Q What do you mean by that, Dr. Bradley?
24 A That means when you have factors, one or more factors
25 that can relate to a disease, one or more exposures, there

1 can also be confounders, other things that are related to
2 the disease you don't know about and you are trying to
3 determine what factors are associated with the disease and
4 in what proportions and how. And then when you get down to
5 the actual causation, what thing causes it, it's also
6 possible to disentangle the different relationships, because
7 you don't know what the relationships are; that is, you may
8 know the factors associated with the disease but you don't
9 know the relationships among them.
10 Q As an epidemiologist and biostatistician, do you seek
11 to offer opinions on causation in an individual case?
12 A No, sir.
13 Q What do you do, sir as part of your profession?
14 A I offer a measures of association or relationships
15 among exposures and diseases for groups of individuals. And
16 then as I pointed out before, if there are none of these
17 associations, then according to epidemiological principles,
18 there cannot be causation, so at that level I'm discussing
19 causation.
20 Q Now, let me take you back to the American Cancer
21 Society study. You recall Mr. Smith asked you a number of
22 questions about that and about your cohort analysis?
23 A Yes, sir, he did.
24 Q All right. The American Cancer Society study, I think
25 you testified, is well recognized in the medical community?

1 A In the medical, yes, sir, it is. And scientific
2 community.
3 Q Are you aware, sir, to what extent it has been relied
4 upon by either governmental sources, for example?
5 A Well, the Surgeon General and other government sources
6 frequently use that database for analyses in their reports
7 at their annual reports. Surgeon General has used it
8 numerous times in reporting on dealings with various facts
9 of smoking and lung cancer or other cancers and in factors.
10 And also peer review papers, there are numerous peer review

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11 papers in the literature that have relied on that database.
12 Q When you say rely on the database, what do you mean,
13 specifically?
14 A Well, I mean they assume that the American Cancer
15 Society and the people they had employed to maintain the
16 database that did the data, did a responsible data in doing
17 so.
18 So by relied on means they trust the
19 information that is in the database to a reasonable degree
20 of certainty.
21 Q Now, going back to Mr. Tompkin's cohort, Dr. Bradley,
22 and the issue, how was Mr. Tompkin's cohort selected to
23 assess his former risk of smoking?
24 May I ask you to return to that
25 demonstrative, sir?

1 A Yes.
2 Q And your purpose in selecting a cohort from the
3 American Cancer Society study was what, sir?
4 A I wanted to get a cohort that represented individuals
5 that were similar to Mr. Tompkin in their smoking history;
6 and then I wanted -- then I could look at the instance of
7 dying from lung cancer in that cohort and compare it to the
8 incidence of dying from lung cancer in a cohort of never
9 smokers.
10 THE COURT: Can I interrupt for a second. I
11 think the work cohort is difficult to deal with. Is
12 there a synonym for cohort that might be useful to
13 those of us not scientists and not heard the word?
14 THE WITNESS: It is just a group of people.
15 THE COURT: Can we use the word group?
16 THE WITNESS: Fine.
17 THE COURT: It means the same thing?
18 THE WITNESS: Same thing.
19 MR. McLAUGHLIN: I appreciate you doing that
20 for me, your Honor.
21 Q So if I understand, Dr. Bradley, you would agree
22 cohort, which is probably more of a scientific term, would
23 mean the same as a group of individuals?
24 A Yes, sir, that's correct.
25 Q And in this case, I think your testimony is it's a

1 group of men?
2 A Yes, sir, it's first off a group of men.
3 Q And that group of men comprise what sort of
4 demographic data, sir, with respect to your analysis?
5 A Well, I chose, besides having to be male, which is one
6 demographic variable, I chose three other parameters to
7 define the cohort.
8 The first was the age at which the person
9 quit. Mr. Tompkin quit smoking in 1965, so at that point,
10 at that point in time he was 30 year old, because his
11 birthday is late, as we pointed out, 1934, December. So he
12 had quit smoking at the age of 30. I chose the cohort, the
13 8 year range 26 to 34. 30 is in the middle of that. But
14 as another check, I checked the average age of quitting of
15 people in that group, and the average age was 31 years of
16 age. So the age was either at or slightly above the
17 average age of quitting that Mr. Tompkin had.
18 Q Okay. And then the next criteria?
19 A The next criterion I chose was how long had it been

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20 since he had quit smoking prior to his death. And the
21 reason you use death as an end point, that is the end point
22 that the American Cancer Society uses is death from lung
23 cancer.
24 Q And your number there was?
25 A And I choice 27 to 35, since 30 is in the middle of

1 that range. And the average was actually 30.5.
2 Q Yes, sir. And then with respect to the smoking
3 history?
4 A Smoking history, once again I explained that when I
5 actually showed them a chart where the average pack years
6 for Mr. Tompkin were 15, he had smoked for 15 years, pack
7 years 15. However, I chose a range of considerably more
8 than that. 17 to 48 pack years, based own on an expert
9 report submitted at that time by one of the plaintiff's
10 experts, who indicated the range might be 17 to 48. So I
11 just took that larger range. Which is definitely going to
12 bias the relative risk to be higher. And the average
13 smoking incidence in that group was 26 pack years.
14 Q Okay. Now, sir, then, in the -- after selection of
15 the group for analysis, did you then apply generally
16 accepted biostatistical and epidemiological techniques in
17 order to calculate and measure what you've testified to here
18 today, specifically statistical significance and relative
19 risk and things?
20 A Yes, sir. I used the standard techniques for
21 computing the relative risk from those two groups of data,
22 the group that's similar to Mr. Tompkin and then the group
23 of never smokers, to determine both the estimate of the
24 relative risk and then whether it was statistically
25 significant or not.

1 Q Yes, sir. But you also looked at another group of
2 males in the study in order to measure the relative risks of
3 exposure to asbestos alone?
4 A Yes, sir, I did.
5 Q Okay. And did you determine a relative risk with
6 respect to that analysis?
7 A Yes, using a similar technique, and I described this,
8 I believe, yesterday, where I'm considering all male
9 individuals in the study that were exposed to asbestos, that
10 includes both the never smokers and the cohort, I came up
11 with a relative risk of 1.56. That was also not
12 statistically significant.
13 Q And what does that mean, sir?
14 A That means that we could not distinguish the incidence
15 of lung cancer in the Tompkin cohort among asbestos exposed
16 individuals and the lung cancer rate among just asbestos
17 exposed to lung with no smoking.
18 Q And did that include -- to what extent did cigarette
19 smoking enter into that equation?
20 A I also had, for Mr. Tompkin's cohort we had an average
21 number of pack years. In that case I believe it was 18
22 average for the cohort.
23 Q And then your conclusion, sir, with respect to the
24 relative risk on the asbestos exposure?
25 A My conclusion was that the cohort of that type does

1 not add any additional risk to lung cancer above and beyond

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what is the risk due to asbestos exposure.
Q And how does cigarette smoking affect that analysis?
A It didn't affect it at all. It did not affect the rate, if that's what you are asking.
Q Exactly how does that differ? To make sure everybody understands, how does that relative risk calculation of 1.56 differ from the relative risk calculation you gave and we showed the jury yesterday of 2.65?
A Well, that calculation of the 2.65 was a completely different analysis. There I took all never smokers. There were no individual's that had smoked in the ACS study, and I simply compared the asbestos exposed to the non-asbestos exposed. So the 2.65 represents the relative risk of dying from lung cancer due to asbestos alone.
Q Now, Dr. Bradley, do you recall that in this case Mr. Smith took your deposition?
A Yes, sir, he did.
Q Did that occur on the 26th day of June in the year 2001?
A Yes, sir, it did.
Q And do you recall approximately how long that deposition lasted?
A About 4 hours, yes, sir.
Q And sir, at that deposition, did you produce to

Mr. Smith all of your reliance materials in this case which included the number of medical articles?
A Yes, sir. I produced to him copies of all the medical articles that I had on my reliance list and brought five additional articles to the deposition.
Q Okay. Did you also produce to him your notes and your file and your calculations in this case?
A Yes, sir, I did.
Q And sir, with respect to some of the articles that you produced to Mr. Smith on the 26th day of June of this year, did -- and upon which you relied in your testimony, did some of those articles consider asbestos and asbestosis and lung cancer?
A Yes, sir, they did.
MR. McLAUGHLIN: Thank you, sir.
THE COURT: Anything further?
MR. SMITH: With the court's permission.

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RECROSS EXAMINATION

BY MR. SMITH:
Q I want to ask you to reconsider one answer you just gave. Was the American Cancer Society designed to measure how many people acquired lung cancer?
A It was. It measured how many people died from whatever cause that may be.

Q Okay. It didn't measure how many people got a disease; it measured how many people died from a disease?
A Or other causes. It could be an accident, whatever the cause of death was.
Q During the 6 year period they were in the group?
A Yes.
Q And I think we've determined that if David Tompkin went into the group you selected, the 27 to 35 at the age of 27, there is a good probability he could not have got in that group?

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11 A You mean, he would have been in the study?
12 Q Could not have got into the study. He could not have
13 been a team player on that group?
14 A If he was diagnosed prior to the start of the study,
15 yes.
16 Q 27 years after cessation, right?
17 A Correct.
18 Q I don't think this is very significant, but I noticed
19 this as I was sitting there. The age of quitting, how old
20 was Dave Tompkin when he quit smoking?
21 A He quit smoking in '65. His birthday is December 28,
22 1934, so he would have been 30 years of age. Maybe he
23 was -- he would not have been 31 yet because I'm assuming he
24 did not quit at the end of December which was his birthday.
25 Q And I'm not going to take you back through all of that

1 again. I'm not going to do that to the jury. I would
2 really like to, but that's neither here nor there.
3 Except I do want to hit a couple of points.
4 One of them is Attorney McLaughlin just
5 mentioned when your deposition was taken, you had computer
6 papers on what had happened. I don't think you ever ran --
7 you didn't run the program for me or anything of that type
8 so I could follow you there either, did you?
9 A Well, that's incorrect.
10 Q Help me?
11 A I think I will. I believe you asked for and I
12 provided to you the raw data that I used. I gave you a CD
13 with the data on it. I also gave you the same manual that I
14 used to extract the information from. I described how I did
15 the analysis and I gave you the computer output from the
16 analysis.
17 Q Can you take us to the page of your deposition where
18 you described what you did, because it is over my head. I'm
19 not criticizing, but I would be glad to go there if you can.
20 I don't remember knowing how to do it when I left your
21 office, and that may just show my ignorance?
22 MR. McLAUGHLIN: Objection. I think counsel
23 is testifying, your Honor. He can take the witness to
24 the deposition.
25 THE COURT: The jury is instructed to

1 disregard the comments of counsel as to what happened
2 in deposition.
3 BY MR. SMITH:
4 Q Can you recall what you told me about how you run the
5 program?
6 A I recall telling you the information which you asked
7 for and I brought to the deposition, I brought everything I
8 had including the raw data. I then described how I got the
9 cohort.
10 Q Yes.
11 A And we went through this in excruciating detail.
12 Q And on how you got the cohort?
13 A How I got the cohort and described the program, and I
14 described to it you.
15 Q Can you remember what you told me?
16 A Not everything.
17 Q Can you describe, in essence?
18 A I think I did that.
19 Q What did you do?

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20 A I'm trying to give you the essence of how the
21 testimony went. I described to you the database. I gave
22 you the raw database, I gave you the manual, I described to
23 you where the fields were that -- the manual described what
24 fields there were. I described to you what field I used to
25 select these variables from. I described to you how I

1 selected the variables.
2 Q Why don't you tell us right now?
3 MR. McLAUGHLIN: Objection, your Honor.
4 That's beyond the scope. And I think at this point
5 counsel has gone beyond. If he wants to --
6 THE COURT: It is beyond the scope. The
7 objection is sustained.
8 BY MR. SMITH:
9 Q At any rate, you are saying here today that at that
10 time you orally told me how to do it?
11 A Yes, sir, I think I did.
12 Q You would agree that you are not orally telling us
13 today how you would do it?
14 MR. McLAUGHLIN: Objection. Still beyond the
15 scope.
16 THE COURT: I don't think it is beyond the
17 scope. I think I questioned the witness about this
18 myself and indicated that he ran a computer program
19 and it wasn't here in court for us to see.
20 BY MR. SMITH:
21 Q Did you run a computer program in front of me that
22 day?
23 THE COURT: Wait a minute. I sustained the
24 objection about this subject. It is beyond the scope
25 of the redirect. Please go to another subject.

1 BY MR. SMITH:
2 Q Do you have any idea of the percentage of males that
3 smoke in the United States?
4 A I don't know if it is males, but I believe the
5 percentage of smokers among adults is approximately
6 25 percent.
7 Q Do you know how many it was, the percentage of smokers
8 of adults?
9 A Yes.
10 Q Is that the number you believe?
11 A I believe it is approximately 25 percent of adults are
12 smokers.
13 Q And how many percent do you believe are smokers who
14 are not adults?
15 A I have no idea.
16 Q There are some that smoke that aren't adults?
17 A That's an absolute. I'm sure there probably are, but
18 I don't have any idea what the number is.
19 MR. McLAUGHLIN: Objection.
20 THE COURT: I think you went back and asked
21 him how he developed his group.
22 Next question, please.
23 BY MR. SMITH:
24 Q Dr. Bradley, you've indicated -- excuse me, I didn't
25 want to interfere with you.

1 MR. McLAUGHLIN: No, I'm just waiting for the

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2 next question.
3 THE COURT: He just figures he's going to
4 object.
5 Go ahead, ask another question. He's
6 probably tired of sitting.
7 MR. McLAUGHLIN: Thank you, your Honor. It's
8 a back problem.
9 I'll sit down.
10 MR. SMITH: No, we are okay. I don't want to
11 mess up your back.
12 BY MR. SMITH:
13 Q Dr. Bradley, on redirect you were asked a question
14 that you gave me papers at the deposition?
15 A Yes.
16 Q You gave me your reference list?
17 A Yes, sir, and the actual articles.
18 Q There were what, 62 or 67 articles?
19 A I'd have to check the number.
20 Q That's -- go ahead -- 62 I think listed?
21 A 64 listed, and I brought five more to the deposition.
22 Q 69?
23 A 69.
24 Q And you testified yesterday the name of an article you
25 were relying for those red bullets that were on your one

1 graph?
2 A No, there were two red bullets on the graph. I
3 underlined an article for one of those books.
4 Q And the name of that article?
5 A Was Steenland. I don't remember the exact article. I
6 could look it up if you would like me to.
7 Q Yes, I wish you would, please?
8 A Steenland article in the American Journal of
9 Industrial Medicine of 1996, titled, Review of Occupational
10 Lung Carcinogens.
11 BY MR. SMITH:
12 Q Thank you, that's number 55?
13 A That's article 55, yes, sir.
14 Q When it comes, I want to ask you this question, too.
15 I don't know who that person was, but that's -- I suppose
16 you do?
17 A Well, I don't know him personally, but he has written
18 a lot of articles in the area of cancer and occupation.
19 Q You are not a medical doctor, is that true?
20 A Yes, sir, that's correct.
21 Q You are not aware of the physiology, or you've never
22 studied the physiology of the human body insofar as how it
23 reacts to tobacco smoke, is that true?
24 MR. McLAUGHLIN: Objection, beyond the scope.
25 THE COURT: Sustained.

1 BY MR. SMITH:
2 Q You have none of the knowledge of a medical doctor
3 when it comes to analyzing these articles insofar as looking
4 at the physiology of them when you arrive at opinions on
5 them, isn't that true?
6 MR. McLAUGHLIN: Same objection.
7 THE COURT: You brought up the articles.
8 Overruled.
9 THE WITNESS: These articles I'm referring to
10 are epidemiological studies, they are not medical

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11 studies so I feel very comfortable in reviewing these
12 articles.
13 Q I'm sorry, forgive me.
14 A And evaluating those articles.
15 Q But you do not have the advantage of being able to
16 evaluate the medical portions thereof, only the number
17 conclusions therefrom; is that generally a fair statement?
18 A That's a pretty broad statement. I think I'm
19 conversant in a lot of areas dealing with medical concepts.
20 Q So you consider yourself to have the ability to
21 evaluate the medical issues involved above and beyond the
22 numbers?
23 A Some of them, yes, sir.
24 Q But you don't consider yourself to be a medical
25 doctor, do you?

1 A No, sir.
2 Q And you've never taught in that area?
3 A Now wait a minute. I have taught medical students.
4 Q But you haven't taught them medicine?
5 A Yes, sir, I've not taught them medicine, that's
6 correct.
7 Q I guess I have one last question. Maybe it is
8 combined, one or two. It is this.
9 With respect to David Tompkin, you do agree
10 that we are beyond the question of whether or not he would
11 get lung cancer?
12 A I would agree that he had lung cancer.
13 Q And you would agree he died from lung cancer?
14 A Yes, sir, I would accept that.
15 Q That's a statistical certainty?
16 A Yes, sir.
17 Q In your mind?
18 A Yes, sir.
19 MR. SMITH: That's all I have.
20 THE COURT: Anything further?
21 MR. McLAUGHLIN: No, your Honor, nothing
22 further.
23 THE COURT: Very well, you may step down.
24 I'm going to take a brief recess at this
25 time. I'm speaking with counsel on another matter.

1 (The jury withdrew from the courtroom
2 and the following proceedings were conducted
3 in open court.)
4 THE COURT: Let the record show that the jury
5 has been excused.
6 Before we start this morning, counsel for
7 the defendants brought to the court's attention that
8 there was apparently a telephone program last night
9 that counsel or the defendant is concerned one or more
10 jurors may have observed the program. And the view is
11 that's possibly prejudicial to the defendants in this
12 case.
13 I've indicated to counsel it is a very
14 slippery slope when the court starts to speak with
15 jurors during the middle of the case about any
16 possible contamination. But out of a sense of caution
17 I'm prepared to do that, with the understanding that
18 I'll speak to each juror separately in the room where
19 we did the voir dire without the presence of counsel

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20 but with the court reporter present. And you will be
21 able, because everything that is being typed you can
22 read as it happens, so you can go to school on what
23 the jurors say.
24 And this is what I intend to do.
25 Number 1, of course I would secure the

1 name and the number of the juror.
2 Secondly, I would say, tell the juror in
3 response to my questions, please do not offer an
4 opinion about this case.
5 And then I would ask this question:
6 Have you read in the newspaper or heard on
7 the radio or seen anything on television since this
8 case started last week that in any way discussed or
9 provided information that a reasonable person might
10 conclude that such information would intend to
11 influence your consideration of the evidence and
12 testimony in this case?
13 And now, I'll go from there based on what
14 the answer is. But I am in no way going to ask
15 questions specifically directed to what happened on
16 the television article last night.
17 Now, if there are any objections to the
18 process, I'm outlining I want to hear them now.
19 MR. COFER: No, your Honor. On behalf of the
20 defendants we think that more than adequately
21 addresses the issue I brought to the court's
22 attention. I appreciate very much your willingness to
23 do that.
24 MR. SMITH: Your Honor, is it your intention
25 to do that at this time?

1 THE COURT: Yes, but not in anybody's
2 presence. So there is no indication what's given rise
3 to the inquiry, I'm going to do it in this fashion.
4 We'll bring number 1 juror in. I'll speak to number 1
5 juror and then isolate number 1 juror from the
6 balance. So no juror coming in to see me will have no
7 clue as to why they are being brought in to see me.
8 I'll operate that way also, so there will be no
9 advanced knowledge of what the inquiry is about.
10 MR. SMITH: Unlike defense counsel, I have
11 never been asked this question before.
12 THE COURT: Well, the question is if you have
13 any objection to the process.
14 MR. SMITH: And I agree, but I've never been
15 in that situation, at least before a verdict.
16 THE COURT: What I don't want to have happen
17 here is that a verdict comes out, and then it is
18 discovered in some fashion that one or more jurors
19 have seen the communication. I'm assuming the
20 plaintiff's verdict, and then the defendants are
21 saying you should have done this and we want a new
22 trial. All I'm trying to do is head off trouble.
23 MR. SMITH: I'm wondering, your Honor, if
24 that's grounds for a new trial.
25 THE COURT: Who knows.

1 MR. SMITH: It seems to me that the

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2 individual jurors cannot be voir dired even after a
3 verdict.
4 THE COURT: I'll tell you one, I had a case
5 to go back to Alabama and spend two days on whether or
6 not I had a process take place in the jury room. So I
7 just know from all my experience that a stitch in time
8 saves 9.
9 MR. SMITH: May I have three or four minutes
10 to respond?
11 THE COURT: How about two?
12 MR. SMITH: I'm going to take whatever I can
13 get, your Honor.
14 THE COURT: All right.
15 What's your position at this minute?
16 MR. SMITH: Your Honor, plaintiff would
17 request that the court not do it and would object.
18 And with the court's permission, I would indicate why
19 I say that.
20 THE COURT: Go ahead.
21 MR. SMITH: Your Honor, and we are all
22 catching this pretty quickly, except they have been
23 through this before in our other cases. It seems to
24 the plaintiff that, number 1, I can't conceive of,
25 based on, I guess, my feelings about cigarettes, that

1 there is anybody from the jury is going to see
2 anything that says cigarettes are good for you right
3 now.
4 Having said that, I'm personally very much
5 concerned that whatever they hear from the court is
6 going to cause them to react against the plaintiff,
7 because -- and when I say that, not intentionally
8 even, but the only thing they could have seen or will
9 see in the press at any time is probably in this day
10 and age is something indicating that cigarettes are
11 killers or words to that effect, if you'll forgive me.
12 and following that up to the conclusion, your Honor,
13 at the end of the case.
14 A lot of things happen during a trial.
15 The court can control them and say, look, you are to
16 disregard anything you have seen, read or otherwise
17 and base your case, as the court well knows. And
18 that's the procedure we would respectfully ask the
19 court to follow.
20 THE COURT: All right. Your objection has
21 been considered and is denied. I'm going to go
22 through the process. I need the court reporters to
23 set up in the office so that the, as you transcribe
24 it, I assume there are people out here that have got
25 their program set up so they can read the questions.

1 I want Mr. Smith to be in a position where
2 he can read them right along with them or you can come
3 up here.
4 MR. SMITH: That's fine.
5 THE COURT: Wherever.
6 MR. COFER: We have two in the courtroom. We
7 can make one available for him.
8 (The jurors were individually questioned
9 in court's chambers, out of the hearing of the
10 attorneys, as follows:)

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11 BY THE COURT:
12 Q Thanks for coming in. You are Miller Rick.
13 A Right.
14 Q And you are juror number 1. I'm going to ask a
15 question, but in response to my question, whatever you do,
16 do not offer any opinion about this case?
17 A Okay.
18 Q Okay. Now, my question is, have you heard -- excuse
19 me. Have you read in the newspaper or heard on the radio or
20 seen anything on television since this case started last
21 week that in any way discussed or provided information that
22 a reasonable person might conclude that such information
23 would intend to influence your consideration of the evidence
24 and testimony in this case?
25 A No, not that I can think of.

1 Q Fine.
2 A Let me be honest now.
3 Q I don't want you to express an opinion about the case.
4 A I'm not going to. I want, you know, are you aware
5 that this case was in the Beacon Journal?
6 Q Yeah, but.
7 A It didn't go into detail.
8 Q No, but you haven't read anything that has influenced
9 your mind about this case?
10 A No.
11 Q All right. Nor have you seen anything else or heard
12 anything that would influence your judgment in this case?
13 A Not really.
14 Q Okay. Good enough.
15 Now, please do not, do your best not to
16 listen to a radio. If you hear anything about the case on
17 the radio turn it off. Don't read anything in the
18 newspaper or watch anything on the television that might
19 affect this case?
20 A The only thing I've seen on TV is about New York. And
21 that's -- I've lost a lot of sleep on it. Tell you what, if
22 I wasn't so damn old I'd be back in the Navy right now.
23 Q I'm no longer an active reservist. I would be gone
24 too. I understand.
25 A Just breaks my heart.

1 THE COURT: We are going to move you out here
2 because we don't want you to talk to other jurors.
3 (Next juror.)
4 BY THE COURT:
5 Q Just have a seat. You are juror number 2, you are
6 Andy Strubbe?
7 A Yes. Correct.
8 Q I'm going to ask you a question, Andy, but in response
9 to my question, whatever you do don't offer any opinion
10 about this case. Fair enough?
11 A Yes.
12 Q Okay. Now listen to my question. Have you read in
13 the newspaper or heard on the radio or seen anything on
14 television since this case started last week, that in any
15 way discussed or provided information that a reasonable
16 person might conclude that such information would intend to
17 influence your consideration of the evidence and testimony
18 in this case?
19 A Can you ask that again?

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20 Q Have you seen anything in the newspaper or heard
21 anything on the radio or watched any kind of a television
22 program that might in some way, in your view, touch on the
23 issues in this case?
24 A No.
25 Q Good enough.

1 Now, as we proceed, don't read anything in
2 the newspaper or listen to anything on the radio or watch
3 any television that might somehow in some way relate to
4 this case, fair enough?
5 A Fair.
6 THE COURT: Good enough you may go out.
7 (Next juror.).
8 BY THE COURT:
9 Q You are Michael, is it Faigley?
10 A Correct.
11 Q Juror number 3?
12 A Correct.
13 Q I'm going to ask you a question. But before I do
14 that, whatever you say to me, please do not offer any
15 opinion about this case.
16 A Okay.
17 Q My question is, have you read in the newspaper or
18 heard on the radio or seen anything on television since this
19 case started last week that in any way discussed or provided
20 information that a reasonable person might conclude that
21 such information would intend to influence your
22 consideration of the evidence and testimony in this case?
23 A No.
24 Q Okay. Fine.
25 Now, do your very best not to read any

1 articles about this in the newspaper or listen to anything
2 on the radio or watch anything on television that might in
3 some way relate to this case.
4 A Right.
5 Q Okay. Thank you.
6 (Next juror.)
7 BY THE COURT:
8 Q You are Lynette Dauterman, and you are juror number 4?
9 A Yes, sir.
10 Q I'm going to ask you a question, but please, in
11 response to my question, whatever you do, do not offer any
12 opinion about this case, okay?
13 A Um-hum.
14 Q Now, since this case started last week, have you read
15 in the newspaper or heard on the radio or seen anything on
16 television that in any way discussed or provided information
17 that a reasonable person might conclude that such
18 information would intend, would intend or would tend, excuse
19 me, to influence your consideration of the evidence and
20 testimony in this case?
21 A No.
22 Q Very well. Now, in the future, don't read anything
23 about the case, don't listen to anything on the radio and
24 don't watch anything on television that in some way might be
25 related to this case. Fair enough?

1 A Yes, sir.

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Q Thank you very much.
(Next juror.)
BY THE COURT:
Q And you are Steven Miller, and you are juror number 5?
A That's correct.
Q I'm going to ask you a question, but in response to my question, whatever that response is, please do not offer any opinion about this case, fair enough?
A Okay.
Q The question is, have you read in the newspaper or heard on the radio or seen anything on television since this case started last week, that in any way discussed or provided information that a reasonable person might conclude that such information would tend to influence your consideration of the evidence and testimony in this case?
A No.
Q Thank you. Now, in the future avoid listening to the radio or reading anything in the newspaper or watching anything on television that might in some way relate to this case, fair enough?
A Fair enough.
(Next juror.)
BY THE COURT:
Q Good morning.

A Hello.
Q You are juror number 6, Janice Lemon?
A Yes.
Q I'm going to ask you a question. And after you hear the question, whatever you do, please do not offer any opinion about this case. Fair enough?
Okay. You might answer out loud. You are going to answer yes?
A Yes, I'm sorry.
Q Now, have you read in the newspaper or heard on the radio or seen anything on television since this case started last week that in any way discussed or provided information that a reasonable person might conclude that such information would tend to influence your consideration of the evidence and testimony in this case?
A No, sir, I haven't.
Q Very well. In the future, try to avoid reading about this case if there is anything in the paper; don't listen to anything on the radio or watch anything on television that might relate to this case or any of the subjects on this case. Fair enough?
A Sure.
Q Thank you very much.
(Next juror.)
BY THE COURT:

Q You are Karen Mitchell?
A Yep, I am.
Q And you are juror 7?
A Yes.
Q I'm going to ask you one question. But in the answer to that question, whatever you do, please do not offer any opinion about this case. Fair enough?
A Okay.
Q All right. Now, have you read in the newspaper or heard on the radio or seen anything on television since this

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11 case started last week that in any way discussed or provided
12 information that a reasonable person might conclude that
13 such information would tend to influence your consideration
14 of the evidence and testimony in this case?
15 A No.
16 Q Very well. Now, in the future, try to avoid reading
17 anything about the case in the paper or listening to
18 anything on the radio or watching anything on television
19 that might tend to relate to issues in this case, okay?
20 Fair enough?
21 A Yes.
22 (Next juror.)
23 BY THE COURT:
24 Q Good morning. You are Diane Hall and you are juror
25 number 9?

1 A Yes.
2 Q Now Diane, I'm going to ask you a question. But in
3 responding to my question, whatever you do, please do not
4 offer any opinion about this case. Fair enough?
5 A Okay.
6 Q Now, my question is, have you read in the newspaper or
7 heard on the radio or seen anything on television since this
8 case started last week, that in any way discussed or
9 provided information that might or would tend to influence
10 your consideration of the evidence and testimony in this
11 case?
12 A No.
13 Q Very well.
14 Now, in the future, try not to read anything
15 about the case or listen to anything on the radio or watch
16 anything on television that might in some fashion be
17 related to this case.
18 A I can't get TV, the cartoons.
19 (Next juror.)
20 Q You are Kathy Lively and you are juror number 10?
21 A Right.
22 Q I'm going to ask you one question, and in response
23 that question, whatever your answer might be, please do not
24 offer any opinion about this case?
25 A Okay.

1 Q Fair enough?
2 A Um-hum.
3 Q Now, have you, have you read in the newspaper or heard
4 on the radio or seen anything on television, since this case
5 started last week, that in any way discussed or provided
6 information that a reasonable person might conclude that
7 such information would tend to influence your consideration
8 of the evidence and testimony in this case?
9 A No.
10 Q Thank you. Now, in the future, avoid reading anything
11 about the case in the paper, avoid listening about the case
12 on the radio, and avoid watching anything on television that
13 a person might say, gee, that tends to relate to the
14 evidence in this case or the issues in this case. Fair
15 enough?
16 A Fair.
17 Q Okay. You may take her out.
18 (The following proceedings were conducted
19 in open court, outside the presence of the jury.)

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20 THE COURT: Let the record reflect that the
21 jury is not in the courtroom.
22 The court has questioned each of the
23 jurors. The court finds no basis for concerns about
24 any jurors. The only juror expressed affirmative
25 information at all was juror number 1. And he wishes

1 he was young enough to be in the Navy and go back on
2 active duty.
3 MR. McLAUGHLIN: Bravo.
4 MR. COFER: Thank you very much. I
5 appreciate it.
6 (The jurors were returned to the
7 courtroom, and the following proceedings
8 were conducted in open court.)
9 THE COURT: Please be seated.
10 Please call your next witness.
11 MR. McLAUGHLIN: Your Honor, request interim
12 argument on Dr. Bradley.
13 THE COURT: Very well, you may proceed.
14 MR. McLAUGHLIN: Thank you very much.
15 Ladies and gentlemen, I think Mr. Smith
16 and I would agree on one thing after Dr. Bradley's
17 testimony, the subject matter is tedious, it is tough
18 stuff, it is hard. And that's why, ladies and
19 gentlemen, I, as I told you, what we would do on
20 opening statement, we brought before you and intended
21 to bring before you the medical witnesses that you
22 need to give you the information to decide this case
23 correctly.
24 Reliable, objective and credible.
25 And plaintiffs did not call an

1 epidemiologist or a biostatistician in their case in
2 chief; we did, because this is tough stuff. But it is
3 important, extremely important in this case.
4 We called a man with impeccable
5 credentials; 190 published peer reviewed medical
6 articles and a professor emeritus. And what did he
7 do? He didn't just review the epidemiological
8 articles which he's familiar with, he did his own
9 analysis of the American Cancer Society data, a study
10 involving 1.2 million people, over 500,000 males. And
11 he called out a cohort, a group of males, as he
12 described to you a lot of testimony in this case of
13 approximately 4100 individuals in this group. In this
14 cohort. 4100 analyzed by Dr. Bradley.
15 Let's compare that to 45 persons analyzed
16 in another study.
17 But most importantly, ladies and
18 gentlemen, he provided this testimony.
19 This is absolutely critical to
20 understanding epidemiological associations of risks.
21 Dr. Bradley testified with respect to
22 Mr. Tompkin. His relative risk of contracting lung
23 cancer from his history of cigarette smoking was 1.59,
24 below 2, which he testified is his threshold; and in
25 addition, it is not statistically significant, his two

1 criteria.

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2 With respect to asbestos exposure only,
3 again, based on the CPS 2 data, he found and
4 determined there was a relative risk of 2.65 for
5 asbestos exposure.
6 I showed you the questionnaire, exposed to
7 asbestos, yes or no? And that's the exposure
8 information in that study. And most importantly, he
9 provided you, ladies and gentlemen, with the relative
10 risk for asbestosis. That is, the relationship
11 between asbestosis and lung cancer.
12 He didn't say, just as Dr. Tomashefski did
13 not, that Mr. Tompkin had clinical symptoms of
14 asbestosis. We are not saying that. He says, because
15 if you do have asbestosis, the relative risk is 9.12
16 of contracting lung cancer.
17 Dr. Bradley said, in this case, the true
18 relative risk is somewhere between the 2.65 and 5.91.
19 And it is closer to the 5.91 than the 2.65 because of
20 Mr. Tompkin's asbestos fiber burden pathology.
21 And that's the heart of Dr. Bradley's
22 testimony.
23 Thank you.
24 THE COURT: Mr. Smith?
25 MR. SMITH: Thank you, ladies and gentlemen

1 of the jury.
2 It is tedious stuff, and I hesitated to
3 put you through the numbers, but I thought it was
4 necessary and I think it is necessary.
5 One thing, I would like to point out a
6 variety of things, but one of them, for openers is Dr.
7 Bradley, he could have picked whatever protocol he
8 determined or matrix to put his information on. He
9 selected one that does not apply to this case. And I
10 say that -- and that may be called a technical
11 statement. But he does a lot of technical things,
12 because he concludes that 1.59, one and a half -- if
13 you are walking down the street and you are David
14 Tompkin, the odds are 1.5 greater that you are going
15 to get lung cancer.
16 According to someone in the world of
17 statistics, we are going to discount that. And that's
18 after he made the prior deductions, which he doesn't
19 know whether the number he says would be over his of 2
20 or not.
21 But then after he does that, he then does
22 this. He takes a program --
23 May I use your board on CPS 2?
24 MR. McLAUGHLIN: Of course.
25 MR. SMITH: Never mind. I won't do that.

1 MR. McLAUGHLIN: Please. And I'll help you
2 get it if you need it.
3 MR. SMITH: You remember it. The CPS 2 is
4 designed to measure deaths. It is a good tool, and
5 that's significant. It is a good thing the country
6 did it. I'm not quarreling with it. But to apply
7 that tool to a person who has a case that includes
8 people who live, and also to try to even make a
9 determination of the effect of smoking. In fairness,
10 you would think you would include both. But David

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11 Tompkin has a claim for his life, and he didn't --
12 there is no live people included in that, because they
13 didn't study it.
14 Now, I made the other point that you
15 either thought were a waste of your time or you think
16 they are worth considering, and that's up to you. The
17 fact that he was 27, he probably couldn't have been in
18 the group.
19 And why would that be significant?
20 Because that would have to dump him into a lower age
21 group, instead of dumping into the 27 to 33 or 4 or 5,
22 as he had it. And I tried to point out what I thought
23 was significant about those last two numbers.
24 When we are quibbling about .41, the
25 difference between 1.59 and 2.00, means life and death

1 for the case, according to Dr. Bradley. So .41 is
2 significant.
3 If he dumps him into an earlier group,
4 then that would pull the number down. If he knocks
5 off 34 and 35, I mean, it would raise the 1.59. It
6 would do the same thing.
7 So those are thoughts.
8 Now, with respect to what he did to these
9 great big red numbers. All he did in that was he ran
10 their numbers, how many people who died from lung
11 cancer were former smokers. And how many of them had
12 asbestos exposure. And how many of them had
13 asbestosis.
14 Now, he did that on the basis -- I grant
15 you, I have to take his word for it, I couldn't tell
16 you if my life depended on it -- one of 69 articles.
17 He doesn't raise it in his report, he doesn't say it
18 in his deposition, he says it here.
19 But those three -- what that says is, if
20 you have asbestosis, you have that increased risk. We
21 are not quarreling with it. We have said it. He
22 differs. He's not a medical doctor. He rejects
23 synergism or things acting together.
24 That does not tell us whether the people
25 that had asbestosis were former smokers or not.

1 That's just the block that got checked there. It
2 doesn't tell us whether the asbestos people were
3 former smokers.
4 Our doctors are saying the same thing. If
5 you have both, the number goes up. And he rejects the
6 concept. He says, well, most the people exposed to
7 asbestos were smokers. And he's not a medical doctor.
8 So the studies have shown that most
9 asbestosis people were smokers. So that 5.91, most of
10 that percentage is going to include the -- it could
11 have a different color, that color would be smokers
12 and asbestosis and just asbestosis. And if that had
13 been called out, which it wasn't, there is a very good
14 chance, and the odds are probably clear, the
15 asbestosis probably would have been statistically
16 insignificant because it includes the blue and the
17 red.
18 THE COURT: Mr. Smith, you have now used the
19 five minutes.

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20 MR. SMITH: I apologize.
21 THE COURT: That's all right.
22 MR. SMITH: Thank you.
23 THE COURT: We'll now take the noon time
24 recess. We will resume at 1:00 o'clock.
25 Please keep the court's instructions in

1 mind. Do not discuss this case among yourselves.
2 Permit no one to discuss it with you.
3 You may file out.
4 (Luncheon recess.)
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1 AFTERNOON SESSION
2 THE COURT: Please be seated.
3 Off the record.
4 (Discussion had off the record).
5 (Jury in).
6 THE COURT: Please be seated.
7 Please call your next witness.
8 MR. SUFFERN: Your Honor, the defense calls
9 Dr. Peter McCue.
10 PETER McCUE,
11 of lawful age, a witness called by the Defendants,
12 being first duly sworn, was examined
13 and testified as follows:
14 THE COURT: Doctor, would you spell your last
15 name?
16 THE WITNESS: M-C-capital C-U-E.
17 THE COURT: Excuse me?
18 THE WITNESS: M-C.
19 THE COURT: Yeah.
20 THE WITNESS: Capital C-U-E.
21 THE COURT: Thank you.
22 DIRECT EXAMINATION OF PETER McCUE
23 BY MR. SUFFERN:
24 Q. Good afternoon, Doctor. Ladies and gentlemen,
25 Mrs. Tompkin.

1 Would you please state your name?
2 A. Peter A. McCue.

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3 Q. What is your occupation?
4 A. I'm a surgical pathologist.
5 Q. Dr. McCue, would you please explain to the jury what
6 you do for a living as a surgical pathologist?
7 A. Well, I work in a hospital. I'm -- essentially I
8 look at glass slides all day under the microscope and make
9 diagnoses from tissue specimens that are provided by the
10 surgeons in the hospital.
11 Q. Where do you conduct your medical practice,
12 Dr. McCue?
13 A. Thomas Jefferson University Hospital in Philadelphia.
14 Q. Besides looking at the slides under the microscope as
15 you just described, do you have any other day-to-day job
16 duties and responsibilities?
17 A. Yes, I do. I'm the director of the service, chief of
18 anatomic pathology, and I'm professor of pathology in the
19 medical school.
20 Q. And as the director of the service, what
21 responsibilities do you have?
22 A. Well, I run the service day-to-day, make sure the
23 diagnoses get out on time, quality assurance. And also I'm
24 involved in a clinical-based research.
25 Q. And in your role as a professor, can you just briefly

1 touch on what you do in that role?
2 A. Mainly teaching. We teach both the second year
3 medical students and the graduate students.
4 Q. Would you please explain to the jury and the Court,
5 Dr. McCue, your educational background after high school?
6 A. I attended Duke University and I graduated, and upon
7 graduation I went to medical school. Graduated from Mt.
8 Sinai medical school in New York City. Stayed in New York.
9 Did a residency at College of Physicians, Surgeons,
10 Columbia University. And then after residency, did a
11 post-doc in molecular biology at the Roche Institute.
12 Q. What is a post-doc in molecular biology, please?
13 A. Post-doc is -- usually do it either after you get
14 your Ph.D. or after you do your residency if you're an
15 M.D., and it's -- essentially it was three years of bench
16 research in the laboratory.
17 THE COURT: I'm sorry, what kind of research?
18 THE WITNESS: Bench.
19 THE COURT: Bench?
20 THE WITNESS: Laboratory research. Mice,
21 rats.
22 Q. Dr. McCue, we have heard throughout the trial
23 references to board certification.
24 Would you tell the jury what that means and
25 whether you are board certified in any disciplines?

1 A. I am board certified in anatomic pathology, 1982.
2 Board certification requires a completion of
3 a standardized training program prescribed by the
4 individual specialty boards. And then after you go through
5 the training program, you take a two-day test.
6 Q. And you are board certified?
7 A. Yes.
8 Q. Have you received any awards or grants throughout the
9 course of your professional career?
10 A. Yes, I've received multiple grants, both from private
11 agencies like the March of Dimes and also from the United

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12 States government, the NIH.
13 Q. And what types of grants have you received from
14 the -- is NIH the National Institutes of Health?
15 A. Yes, it is.
16 Q. What types of grants have you received from the NIH?
17 A. Well, these are research grants. We had a grant
18 studying bladder tumors and the immunologic responses, and
19 most currently I have a grant to run the pathology
20 facilities for our local clinical cancer center.
21 Q. Is that your area of research interest, cancer
22 research in general?
23 A. Yes, it is.
24 Q. Will you explain in a little bit more detail for the
25 jury and the Court what your particular area of research

1 interest is?
2 A. Currently we're very interested in the genes
3 surrounding a break point of chromosome 3, and specifically
4 the short arm of chromosome 3. We call that 3P. P stands
5 for petite.
6 And there's a whole field that's emerging in
7 cancer research that's looking at specific break points in
8 chromosomes, and these break points, if you think of a
9 chromosome as a long arm, they are floppy and they break
10 normally in the course of living.
11 They can break secondary to radiation damage.
12 They can break secondary to chemical exposure. Or they can
13 break on their own. And they are called fragilocytes, and
14 we call them fragilocytes because they are, in fact,
15 fragile.
16 And it turns out that around the
17 fragilocytes, there are genes that are important in
18 regulating cell growth. And sometimes you lose the
19 regulation such as losing the brakes on your car, and all
20 of a sudden the cell just goes into forward gear and
21 doesn't stop dividing. And it forms a cancer.
22 And so we are very interested because there's
23 10,000 genes; you can't study them all. We are looking at
24 just a couple genes on 3P.
25 Q. Throughout the course of your career, Dr. McCue, have

1 you published in scholarly journals?
2 A. Yes, I have.
3 Q. Can you give -- would these be peer-reviewed
4 publications?
5 A. Yes, they are.
6 Q. Could you give the jury and the Court an idea, if
7 it's possible, of how many peer-reviewed journals you've
8 written or co-authored?
9 A. Co-authored or written, probably close to 90 articles
10 to date.
11 Q. How many book chapters, Dr. McCue?
12 A. Three.
13 Q. Dr. McCue, I'd like to ask you if you've had the
14 opportunity in your practice to see and diagnose lung
15 cancer in patients?
16 A. Yes, we see, in my practice, cancer, lung cancer
17 almost everyday.
18 Q. I want to ask you, Dr. McCue, does cigarette smoke
19 damage lung tissue?
20 A. Yes, it does.

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21 Q. Can you just generally tell the jury and the Court
22 how cigarette smoke damages lung tissue?
23 A. Well, the precise mechanism of how it damages is
24 still to be worked out, but as a pathologist I can tell you
25 what I see under the microscope.

1 And one of the things that I look for is
2 changes in the cells that line the windpipe. We look for
3 changes in the structure around those cells, i.e. is there
4 increased mucous glands. I think you all heard of smoker's
5 cough, and that comes from an up-regulation or a
6 hyperplasia of the mucous glands in the bronchial tree.
7 We look at changes of cell type, and I think
8 I could demonstrate that for you.
9 Q. Well, if I may, I'd like to ask the Court's
10 permission to do that in a few minutes, but let me ask you
11 a couple more questions before we get there, if I may.
12 A. Um-hmm.
13 Q. Can cigarette smoking cause lung cancer?
14 A. Yes, it can.
15 Q. Besides cigarette smoking, what are some other, if
16 any, insults to the body or to the lungs that can cause
17 lung cancer?
18 A. Well, we recognize that radiation or radon exposure
19 can cause lung cancer. We recognize that asbestos can
20 cause lung cancer. We recognize that silicates or mineral
21 dusts can cause lung cancer.
22 Lung cancer can be caused by bad genes. You
23 could just be unlucky, have parents with bad genes. You
24 can't really do much about that.
25 But we are kind of stuck with that. And we

1 also know that cancer increases as we age.
2 There's also now a body of literature at
3 least in the common press that perhaps what we eat affects
4 whether we develop cancer. And certainly there's a big
5 push for broccoli, for tomatoes, for green and yellow
6 vegetables, and so the word is still out on the exact
7 mechanisms, but we do have these associations.
8 Q. Sounds like there are a lot of potential factors in
9 the causation of lung cancer, is that fair?
10 A. That's fair to say.
11 Q. Dr. McCue, is there a medical discipline or science
12 that looks at all these disparate factors to predict
13 whether any given lung cancer that occurs some years down
14 the road, we could predict what it was caused by?
15 A. Yes.
16 Q. What is that discipline, sir?
17 A. That's called epidemiology, and the people who do
18 that are epidemiologists.
19 Q. In your practice, as a practicing surgical
20 pathologist, are you required to have knowledge of
21 epidemiology?
22 A. We're required as doctors to have a working
23 knowledge.
24 Q. And do you have a working knowledge of the
25 epidemiology regarding cigarette-caused lung cancer?

1 A. Yes.
2 Q. Do you also have a working knowledge of the

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3 epidemiology of asbestos-induced or caused lung cancer?
4 A. Yes.
5 Q. Dr. McCue, have you had an opportunity to look at
6 Mr. Tompkin's pathology slides in this case?
7 A. Yes, I have.
8 MR. SUFFERN: Your Honor, may I approach the
9 witness?
10 THE COURT: Yes.
11 MR. SUFFERN: I left something back here. It
12 will just take me a second.
13 Q. Dr. McCue, I'm not going to try to introduce this
14 into evidence, but I just want to ask if you can explain to
15 the jury what this is that I'm handing you?
16 A. These are pathologic slides that I had the
17 opportunity to examine and take photographs of, and this is
18 what I do all day.
19 I look at maybe 20 or 30,000 of these a year,
20 and these are little bits and pieces of tissue that are
21 taken out of patients. We fix them to make them hard. And
22 we make them hard so we can slice them very thin. And then
23 we can look at them by transilluminating them with light.
24 You have to cut them thin enough so the light will get
25 through. And we look at them under the microscope.

1 And essentially, I look at patterns all day.
2 I look at what's on the scope, much like, I don't know if
3 someone might do bird watching.
4 Q. Is there a way, Dr. McCue, to photograph what you're
5 seeing on those pathology slides under the microscope?
6 A. Yes, I have a camera hooked up to my microscope.
7 Q. And can you explain to the jury just briefly how that
8 works? What do you do?
9 A. Well, in my practice, typically when -- we have a
10 large residency program. I have a two-headed microscope.
11 Resident sits at one end and I sit at the other and the
12 camera sits on top, and I make sure that he knows what I'm
13 looking at. He can recognize the same things that I
14 recognize.
15 And when we find interesting pathologic
16 features or interesting patterns, we take photographs of
17 it. We just divert the light up to the -- up to the
18 camera, we expose the film.
19 Q. Dr. McCue, in this case where -- from where, from
20 what sources, excuse me, were the pathology specimens of
21 Mr. Tompkin that you reviewed?
22 A. The pathology came from his initial biopsy. Then it
23 came from his lung resection, his right upper lobe
24 resection after he was clinically downstaged with
25 radiation/chemotherapy. And then I also looked at some

1 autopsy material.
2 Q. I think we know about the biopsy and the autopsy, but
3 when you say the resection, can you tell the jury what that
4 is, please?
5 A. That's when they took out his right upper lobe
6 of -- his upper lobe of his right lung surgically.
7 And typically, when they do that, they bring
8 it to the pathology and we examine it, and we examine it
9 for the purpose of telling the clinician what type of tumor
10 it is, whether it got out of the lung, whether it involved
11 the blood vessels, meaning if it spread to distant parts of

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12 the body. So really grading -- like, grading and staging.
13 Q. Dr. McCue, did you photograph, as you previously
14 described the process to the jury, any of Mr. Tompkin's
15 tissue specimens from his pathology?
16 A. Yes. Yes, I have.
17 MR. SUFFERN: Your Honor, may I approach the
18 witness?
19 THE COURT: Yes.
20 MR. SUFFERN: Mr. Smith, I provided you with
21 this last evening.
22 MR. SMITH: Yes, sir.
23 MR. SUFFERN: Your Honor, I'm handing to the
24 witness a document that we've identified as Defendants'
25 Composite Exhibit AT 225.

1 Q. And I'd like you to have a look at that, Dr. McCue,
2 and let me know when you have had a chance to do that.
3 And if so, tell me if you recognize it,
4 please.
5 A. Yes, I do recognize these.
6 Q. Can you tell the Court and jury what those are?
7 A. These are pictures I took from Mr. Tompkin's
8 pathology materials, from my microscope and my camera.
9 Q. Dr. McCue, earlier you were talking about the ability
10 to see damage caused by cigarettes in the lungs of your
11 patients.
12 Is that correct?
13 A. Correct.
14 Q. I'd like to show you one of the photomicrographs that
15 appears on that exhibit.
16 And I would like you to tell the jury,
17 please, if you recognize this particular photomicrograph.
18 If you'd like to, however you are
19 comfortable, Dr. McCue, if you would like to step down with
20 the Court's permission?
21 THE COURT: You may do so.
22 MR. SUFFERN: Thank you, Your Honor.
23 THE COURT: Give him the mike.
24 A. This is a photomicrograph I took of Mr. Tompkin's --
25 THE COURT: Wait a minute. Let's get him the

1 mike.
2 MR. SUFFERN: Thank you. Would you like this
3 microphone? It might help. Thanks.
4 THE WITNESS: Thank you. I'm sorry.
5 A. This is a photomicrograph I took of Mr. Tompkin's
6 lung tissue from his lung resection specimen.
7 Q. Can you tell the jury why you chose to photograph
8 this particular specimen, and what it reveals?
9 A. Okay. This is a picture of his airways. And this is
10 a representative picture of the airways. All his airways
11 looked like this.
12 And what it reveals is fairly normal
13 histology. And I had mentioned before that there are
14 smoking-related changes, but before I could talk about
15 smoking-related changes, I need to tell you what's normal.
16 And essentially what is normal is what's
17 depicted on this slide. And you can see these are
18 individual cells, and these are the nuclei of the cells,
19 this pink stuff is called the cytoplasm, and this is the
20 basement membrane which the cells sit on. And the air

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21 travels in this potential space.
22 And I want you to notice that at the tip of
23 the cells is this little fuzz, and this is called cilia.
24 And this cilia is how we are made, and when the air comes
25 in and it has various particles in it, the cilia captures

1 it and it kind of sweeps it out. These cilia move all the
2 time.
3 Now, of course, we were made and developed
4 not to compensate for the various environmental insults we
5 have today, so a lot of times with the dust and the soot
6 and the smog, these cilia are overwhelmed and of course
7 things get into your lung. And we don't really have any
8 proper mechanism to sweep them out.
9 Back in the old days, we did. And this
10 worked very nicely.
11 Nowadays it doesn't.
12 I also want to point out that notice that all
13 the cells look the same. They are all lined up like a
14 little picket fence, and all the nuclei are nice and round
15 and regular.
16 Q. What's the significance of that fact, Dr. McCue, that
17 they are lined up and regular?
18 A. This is normal pristine bronchial epithelium.
19 Q. And that's from Mr. Tompkin's lung tissue?
20 A. Correct.
21 Q. Have you prepared a demonstrative, Dr. McCue, that
22 would assist the jury in contrasting what Mr. Tompkin's
23 lung tissue looks like as compared to the lung tissue that
24 has these smoking-related changes you previously described?
25 A. Yes, I have.

1 MR. SUFFERN: Your Honor, may I?
2 THE COURT: Yes.
3 Q. Will you please explain to the jury, Dr. McCue, what
4 we have here?
5 A. Okay. This is a slightly smaller version of
6 Mr. Tompkin's epithelium, and here this is from a case of a
7 patient with lung cancer which I had a good clinical
8 history of smoking, and I wanted to show you that this is
9 the changes that we associate with smoking damaged
10 epithelium.
11 Notice, first of all, that these cells have
12 lost their cilia. Also notice that they are not one or two
13 layers thick. They've increased in number so they've
14 gotten thicker. So they've proliferated or they've divided
15 secondary to the damage.
16 And also notice that instead of being -- the
17 nuclei being nice and round and regular, they are all
18 different shapes and sizes. And they are not all lined up
19 in a row. But some are lined up up, down, sideways, all
20 over.
21 And this is the type of changes that one
22 associates under the microscope with damage secondary to
23 smoking.
24 It can also occur in damage secondary to
25 inhaling smoke, inhaling hot gases, radiation. You know,

1 if you're a fireman, you have -- and you do a lot of smoke
2 inhalation and don't wear your mask, you certainly get

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3 changes like this.
4 Q. Dr. McCue, let me ask you a question: You know,
5 don't you, that Mr. Tompkin did have a smoking history?
6 A. Yes, I do.
7 Q. Will you tell the jury, please, what you know about
8 his smoking history?
9 A. Well, according to his deposition, he did smoke for
10 approximately 15 years and then quit in 1965.
11 And I also know that by reading the
12 depositions, he was diagnosed in 1992 of lung cancer. So
13 there was a 25-plus year no-smoking history. And in the
14 meantime, you can see that his lung probably when he was
15 smoking heavily looked like this, but in the intervening
16 years, it healed itself.
17 Q. Can I ask you, Dr. McCue, to tell me how that
18 happens?
19 How is it that the lung can go from this
20 damaged state to the healed state as you've described?
21 A. Well, all -- all, I say 99% of the tissues in the
22 body will heal themselves.
23 And we need that because of normal wear and
24 tear during the day. And they heal themselves by dividing
25 and pushing up -- the damaged cells will just fall off and

1 the cells at the bottom, the reserve stem cells, will
2 divide and then form a more mature cell.
3 So even if you have damage, this damage is
4 reversible.
5 Q. Now, Doctor -- I'm sorry, I didn't mean to interrupt.
6 A. No. I was just going to say that various tissues
7 will heal themselves faster than others.
8 If you have a cut, you know, you have a big
9 gape in your skin, you suture it together, it heals. And
10 it will heal within four to five days.
11 Lung epithelium takes a little longer, but
12 certainly you can see after 25-plus years his epithelium at
13 least pathologically under the microscope looks great.
14 Q. Earlier you told the jury that you were aware of the
15 epidemiological literature regarding smoking and lung
16 cancer.
17 Do these findings comport with your knowledge
18 of that epidemiological literature? If so, how?
19 A. Well, I think they point out a good point. They
20 point out if in fact you do quit smoking, your epithelium
21 changes and it goes back to normal.
22 And this correlates very well with the
23 self-healing of the body and the declining risk that's been
24 reported by the Surgeon General's report.
25 Q. When you say declining risk, would you please tell

1 the jury what you mean by that, sir?
2 A. Okay. If, in fact, and I think most people do
3 ascribe cigarette smoking does give you an increased risk
4 for lung cancer, and your doctor tells you to quit, the day
5 you quit, your body starts regenerating itself.
6 And we know by studying, and this is done by
7 the epidemiologists, but in the late -- in the regular
8 medical journals we know that the risk goes down every
9 year. And by the eighth year, you've really decreased your
10 risk by approximately 90%. And by 15 or 20 years, you are
11 almost down to baseline or down to a normal population.

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12 Q. Dr. McCue, what type of a tumor did Mr. Tompkin have?
13 A. Mr. Tompkin had an adenocarcinoma of his lung.
14 Q. And did you take a photomicrograph of that
15 adenocarcinoma?
16 A. Yes, I did.
17 Q. If I may.
18 Will you please explain to the jury,
19 Dr. McCue, what's depicted on this photomicrograph?
20 A. This is from the initial biopsy when they went in
21 with a scope into Mr. Tompkin's chest, and then they took a
22 little piece of tissue from a lymph node.
23 I know it's a lymph node because these are
24 lymphocytes. You don't know that, but I know that because
25 this is what I do for a living.

1 This dark stuff is carbon pigment, we call
2 that anthracosis, A-N-T-H-R-A-C-O-S-I-S.
3 Q. We'll check it later.
4 A. Most everyone in the city has that. You get it from
5 soot, you get it from car exhaust.
6 But within the normal tissues, there was this
7 tumor. And you can see the tumor cells are bigger than the
8 small lymphocytes. They seem to be forming a circle which
9 is a gland. So it's an adenocarcinoma.
10 It has mitotic activity, and this lymph node
11 was seen to be enlarged on x-ray and so the surgeon knew
12 where to go and what to biopsy.
13 Q. Let me ask you a question about the location of the
14 adenocarcinoma.
15 Was it peripherally located? And what does
16 that mean?
17 A. It was a peripheral adenocarcinoma. That means it
18 was away from a major bronchus.
19 Q. What's a bronchus, Doctor?
20 A. An airway, a large airway.
21 Q. Thank you.
22 Would you please tell the jury and the Court
23 what this next photomicrograph displays, and why you saw
24 fit to photograph it?
25 A. Oh, because as a pathologist I'm looking for all the

1 pathology in the lung, and I started off looking for
2 smoking-related changes and I also look for other changes
3 in the lung, and I found areas, many areas that looked like
4 this.
5 And this, I think you can appreciate, is a
6 circular-like structure. This came from the actual lung
7 tissue, not an airway, but the lung tissue itself.
8 And it's growing in a circle which we call a
9 nodule. And it goes in a circle, we call that
10 circumferential, and it's dense collagen or dense scarring.
11 We call that fibrosis or nodular circumferential fibrosis;
12 with pigment in it, is called a silicotic nodule.
13 Q. Dr. McCue, is a silicotic nodule normal pathology or
14 does it indicate something else?
15 A. It's pathology, it's abnormal, and it indicates that
16 there are silicates or quartz-like dust that's in this
17 lung.
18 Q. And what's the relationship between the quartz-like
19 dust that you described and the nodule?
20 A. Well, if you get too much dust in your lungs, the

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21 body reacts to it and forms a scar around it, tries to blow
22 it off. But if you get overloaded, of course the entire
23 lung gets scarred down and you lose the capacity to
24 breathe.
25 But we typically -- this is a typical

1 pathologic finding of a silicotic nodule.
2 Q. Is it fair to say this is caused by the dust, or did
3 you already say that? I'm sorry.
4 A. Yes, it's caused by silicates, by inhaling dust.
5 Q. Did you photograph, find any photographic or
6 microscopic evidence of the silicotic -- excuse me, of
7 these dusts in Mr. Tompkin's lungs?
8 A. Yes, I did.
9 Q. Will you please tell the jury what this
10 photomicrograph depicts?
11 A. Okay. Well, let me back up and say the stains that
12 we use to look at the tissues will stain what is known as
13 organic material. These are vital stains that are picked
14 up by the cell parts.
15 However, our stains are biologic or organic
16 stains and will not stain quartz, they will not stain
17 silica or anything that's inorganic. That looks invisible
18 to us under the microscope.
19 However, if we polarize the light -- and by
20 polarizing the light, it's the same type of lens you have
21 in a sunglasses so you use polarized glass to look at the
22 sunlight or go fishing because it turns the light in one
23 direction and it reduces the glare. And so you can see
24 under the water.
25 And so if you do that under the microscope,

1 the light will go in one direction, and if it hits an
2 inorganic particle or quartz particle or a mineral
3 particle, it will bounce off and it will glow.
4 And this is what I did in this picture, and
5 this is the silicotic nodule under polarized light. And
6 you can see he's got literally thousands of these little
7 starry sky patterns, and this is all the quartz dust in his
8 lungs.
9 Q. Dr. McCue, will you please explain to the jury, other
10 than these quartz dusts, whether you found any other
11 evidence of any insults to Mr. Tompkin's lungs?
12 A. Yes, I did.
13 MR. SMITH: May we approach the bench,
14 please?
15 (Proceedings at side-bar:)
16 MR. SMITH: Is there even a place in his
17 report that he talks about this?
18 MR. SUFFERN: Absolutely.
19 MR. SMITH: What exactly is he referring to?
20 MR. SUFFERN: He talks about finding the
21 pathological -- starting back here, "I've reviewed the
22 pathology slides," bearing these various section numbers
23 that we have depicted. He showed there is adenocarcinoma.
24 He shows that he has diffuse radiation damage. He shows
25 that it has fibrosis and adenocarcinoma and shows mineral

1 fibers.
2 THE COURT: Don't read so fast.

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3 MR. SUFFERN: I'm sorry.
4 "Mineral fibers and birefringent particles,"
5 B-I-R-E-F-R-I-N-G-E-N-T, birefringent particles, which are
6 the starry sky patterns he just showed, "with associated
7 pigment and nodular and other fibrosis," and mineral fiber
8 is what we have on the board.
9 THE COURT: Don't read so fast.
10 MR. SUFFERN: Mineral fiber is what we have
11 on the board now. So I think it's very adequately
12 addressed in the report.
13 MR. SMITH: Okay. Thanks.
14 MR. SUFFERN: Thank you.
15 May we continue, Your Honor?
16 THE COURT: Sure.
17 (End of side-bar conference).
18 BY MR. SUFFERN:
19 Q. Dr. McCue, would you just one request, would you
20 please maybe try to direct your voice a little bit more
21 into the microphone because the court reporter mentioned
22 she is having a little trouble hearing you.
23 A. I'm sorry.
24 Q. Would you please explain to the jury what this
25 finding illustrates?

1 A. Okay. As I was saying before, I knew from reading
2 the depositions that Mr. Tompkin was in the construction
3 trade, he was a mason for many years, and so I was looking
4 for other evidence of occupational exposure.
5 And I believe that this picture shows very
6 well that not only did he have mineral particles, but he
7 had mineral fibers. And that's this sliver or this
8 rod-shaped material right in the middle of his lung.
9 And again, that doesn't stain very well so I
10 suspected that it was an inorganic mineral fiber, so again
11 I polarized that and took a photograph.
12 Q. Would that be -- would that be this slide, Dr. McCue?
13 A. Yes.
14 Q. Please explain it to the jury.
15 A. This is the photographic equivalent of a polarized
16 section from the previous illustration, and again this
17 demonstrates an inorganic mineral fiber sitting in
18 Mr. Tompkin's lung tissue.
19 Q. Dr. McCue, these fibers that you mentioned, can they
20 cause any disease process in the lung?
21 A. Yes. They start the process of fibrosis, epithelial
22 activation, and eventually will be the cancer if the
23 exposure is long enough and heavy enough.
24 Q. Did you find any evidence of this fibrosis in
25 Mr. Tompkin's lungs?

1 A. Yes, I did.
2 Q. Would you please explain this slide to the jury,
3 Dr. McCue?
4 A. Okay. This comes from the resection specimen, and
5 this is what was left of part of Mr. Tompkin's lung.
6 I didn't really actually bring a normal lung
7 tissue, but you can see this looks like scar. This is
8 dense collagen. There's very few residual air spaces where
9 the oxygen can get in.
10 And I want you to notice that this is dense
11 scar that has an orientation to it. So it tells me that

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12 it's an old scar, that it's been there for many years.
13 And scars will do that. You know, when you
14 have a scar on your skin, it starts off as red and kind of
15 bumpy, and then over the years it shrinks and it changes
16 colors and tightens up and gets smaller.
17 And this is called remodeling. And this is
18 what this scar has done, it has remodeled. It has an
19 actual structure to it, an orientation to it, so it tells
20 me it's an old scar and it's been there for a long time.
21 Q. Dr. McCue, besides these silicotic and other
22 inorganic materials that you found in Mr. Tompkin's lungs,
23 did you find any pathologic evidence of any actual asbestos
24 bodies in his lungs?
25 A. Yes, I did.

1 Q. Do you have a photograph of that, sir?
2 A. Yes, I do.
3 Q. Can you tell the jury what this little worm-like
4 creature that we see here is?
5 A. Yes. This is a photomicrograph from the autopsy
6 material from Mr. Tompkin's right lower lobe.
7 The color is a little different because the
8 person who did the autopsy, Dr. Tomashefski, stained this
9 section with an iron stain. In the trade it's called a
10 Prussian blue stain; blue because it's blue, Prussian
11 because I don't know why.
12 And this stain has an affinity for iron.
13 Iron being ferric or ferrous, and this is called the
14 ferruginous body, and it's characteristic of an asbestos
15 fiber.
16 Q. Can asbestos fibers like this one that you found in
17 Mr. Tompkin's lungs, can they lead to any disease process?
18 A. Yes, they will lead to both fibrosis and to cancer.
19 Q. Did you find any evidence of any asbestos-induced
20 disease process in Mr. Tompkin's lungs?
21 A. Yes, I did.
22 Q. And did you take a photomicrograph of that, sir?
23 A. Yes, I did.
24 Q. Would you please explain to the Court and jury the
25 significance of this specimen?

1 A. This is what is known as a pleural plaque. This was
2 actually described in the autopsy report sitting on the
3 bottom of the lung, so-called the diaphragmatic surface of
4 the lung, and it's light microscopy picture, the picture I
5 see under the microscope is virtually diagnostic of
6 asbestos exposure.
7 And again it's called a pleural plaque and
8 it's got a -- now, if you think about this as wallpaper,
9 and people might always say I match wallpaper all day, it
10 has a certain structure and it's called basket weave. The
11 fingers go together.
12 And this basket weave-type pattern sitting on
13 the coating on the outside of the lung is essentially
14 diagnostic of asbestos exposure.
15 Q. Thank you, Dr. McCue. Would you please sit down for
16 a moment? I might ask you to stand up in a second, but I
17 have a few questions before that.
18 Dr. McCue, before I get to where I was going,
19 let me ask you, you showed Mr. Tompkin's normal or healthy
20 bronchial epithelium.

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21 Other than damage to the bronchial
22 epithelium, are there other -- is there other damage caused
23 by cigarette smoke that pathologists are able to see under
24 the microscope?
25 A. Yes.

1 Q. What are some of those types of damage?
2 A. Well, first of all, we see the changes in the
3 epithelium, we see inflammation, we see a thickened
4 collagen or a scar-like pattern underneath the epithelium
5 of the air spaces.
6 We also see brown pigment in inflammatory
7 cells that sit in the airways. We call them pigment-laden
8 macrophages.
9 We also see changes of emphysema,
10 peribronchial. And we see mucous lining hyperplasia.
11 Q. Did you see any of that, Dr. McCue, in your
12 investigation of Mr. Tompkin's pathology specimens?
13 A. No, we did not.
14 Q. Other than the pathology specimens that we've just
15 shown the jury, have you reviewed anything else in
16 connection with your work in this case?
17 A. Yes. I reviewed some of the expert reports.
18 Q. Are you familiar with an expert report prepared by
19 Dr. Tomashefski?
20 A. Yes, I am.
21 Q. Did Dr. Tomashefski conduct any special studies on
22 Mr. Tompkin's pathology tissue?
23 A. Yes, he did.
24 Q. Will you explain what you know about that to the
25 jury, please?

1 A. He did multiple special tests other than the routine
2 pathology tests or the routine pathology specimens that I
3 showed and what I see during my normal workday.
4 He did a fiber count analysis of the lung
5 tissue. And he did a silicate particle analysis of the
6 lung tissue. And he also did two molecular tests, one for
7 a gene called P53 and one for a gene called K-Ras.
8 Q. Let's get to P53 and K-Ras in just a second.
9 What did the other studies, the fiber burden
10 analysis show?
11 A. Fiber burden analysis showed, and without getting too
12 specific in the absolute numbers, but the statement was in
13 the report that Mr. Tompkin's lung had fiber burden in the
14 low range of asbestosis.
15 Q. Dr. McCue, what is -- what are these P53 and these
16 K-Ras studies that you just mentioned?
17 A. Well, in the scientific literature, these two genes
18 have been studied in relationship to damage caused by
19 cigarette smoking.
20 They are well-studied. There's multiple
21 papers. They have been confirmed many times. And
22 essentially what they say is that these two genes are
23 altered in cases of cancers that have been associated with
24 cigarette smoke.
25 For P53, a high number is 57%, and for K-Ras,

1 the high number is 51%. Some people have low numbers, too,
2 but I'm just giving you the high numbers.

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3 Q. An alteration in these two genes, in both of these
4 two genes in your mind, and according to the medical
5 literature for that matter, tends to strengthen the case
6 that a cancer was caused by smoking?
7 A. Yes, it does.
8 Q. And a negative P53 and K-Ras, both, would weaken the
9 case that a cancer was caused by smoking?
10 A. Yes.
11 Q. What were the results of Dr. Tomashefski's P53 and
12 K-Ras studies in this case, sir?
13 A. They were reported to be negative.
14 Q. Earlier we were talking about your area of research
15 interest, and you explained to the jury that you look at
16 the short arm of chromosome 3, is that right?
17 A. Correct.
18 Q. Are you familiar with the phrase LOH or loss of
19 heterozygosity testing?
20 A. Yes, I am.
21 Q. Can you explain to the jury what that means?
22 A. A loss of heterozygosity, LOH, is looking at
23 essentially the break points in the genes around the
24 fragilocytes.
25 And because we have two genes for most,

1 sometimes we have more than two, but we usually have two
2 copies of every gene, and if you look at these on a jell,
3 when you extract the DNA, if they both look the same,
4 you'll get two bands, one for each chromosome. And if you
5 lose one, you get one band.
6 Q. Now, you've studied 3P, looking for this kind of
7 loss, correct?
8 A. Correct.
9 Q. Did you consider doing any LOH testing in
10 Mr. Tompkin's case?
11 A. I considered it until I found out that the only tumor
12 tissue that was available was tumor tissue that was treated
13 by radiation chemotherapy.
14 Q. Did you prepare a photomicrograph that illustrates
15 some of Mr. Tompkin's tumor-treated -- excuse
16 me -- radiation-treated tumor?
17 A. Yes.
18 MR. SUFFERN: Your Honor, may I?
19 THE COURT: Yes.
20 Q. Will you please explain to the jury, Dr. McCue, why
21 you chose to photograph this particular specimen?
22 A. Well, this is an interesting photograph because it
23 shows the difference between a tumor cell, which are these
24 big pink cells, after treatment, as compared to the first
25 slide -- or the third slide I showed you that showed his

1 tumor before treatment.
2 And what happens is that when you give
3 chemotherapy and radiation to tumor cells, you cause
4 genetic damage, and the normal working mechanisms of the
5 cells are damaged, they swell up and they start to
6 disintegrate and they get -- these are holes. And
7 sometimes the nuclei shrink down and sometimes it just
8 balloons up.
9 And the whole point of this therapy is that
10 we want to cause as much genetic damage in the tumor cells
11 so that the next time they divide, they die.

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12 Q. So what would be the problem with doing LOH testing
13 on radiation-damaged tissue?
14 A. Well, if you look, now the LOH testing is a very
15 sensitive test and you are looking for minute changes,
16 breaks in the chromosome.
17 If I go ahead and treat a patient with the
18 intention of genetically destroying his tumor cells, I've
19 kind of prejudiced the test because I've already created
20 the breaks that I'm looking for.
21 So it would kind of be invalid.
22 Q. Thanks, Doctor. You may retake the stand, please.
23 Dr. McCue, based upon your education, your
24 experience, your review of Mr. Tompkin's pathology slides,
25 your familiarity with some of the other documents that you

1 mentioned in this case, have you formed an opinion to a
2 reasonable degree of medical certainty as to what caused
3 Mr. Tompkin's lung cancer?
4 A. Yes, I have.
5 Q. Would you please share that opinion with the jury and
6 the Court?
7 A. Based on my pathologic evaluation, my reading of the
8 expert reports, I believe that his lung cancer most likely
9 resulted from his occupational exposure to silicates and
10 asbestos.
11 Q. Do you have an opinion, to a reasonable degree of
12 medical certainty, as to whether cigarette smoking was a
13 proximate cause of Mr. Tompkin's lung cancer?
14 A. Yes, I have an opinion.
15 Q. Will you please share that opinion?
16 A. I could find no pathologic evidence or biochemical
17 evidence with regards to the P53 or K-Ras testing, that
18 showed that he had an effect from cigarette smoking.
19 MR. SUFFERN: Thank you, Dr. McCue.
20 Mr. Smith.
21 Would you like me to take that down?
22 MR. SMITH: Pardon me?
23 MR. SUFFERN: Would you like me to take that
24 down?
25 MR. SMITH: That's okay.

1 May we approach the bench a moment?
2 THE COURT: Sure.
3 (Side-bar conference had off the record).
4 THE COURT: We will take about a ten-minute
5 break.
6 You may file out.
7 (Jury out).
8 (Recess taken).
9 (Jury in).
10 THE COURT: Please be seated.
11 You may cross-examine.
12 MR. SMITH: Yes, sir. Thank you, Your Honor.
13 CROSS-EXAMINATION OF PETER McCUE
14 BY MR. SMITH:
15 Q. Dr. McCue, do you agree with the concept that there
16 can be more than one cause and more than one type of an
17 event that leads to lung cancer?
18 A. Yes.
19 Q. And within that group of events that can lead to lung
20 cancer, Dr. McCue, you would include what, please, sir?

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21 A. Could you --
22 Q. What types, by type of event that you would classify
23 as being able to contribute to the cause of lung cancer?
24 A. If you look at it from a molecular event, you would
25 have to -- you could postulate the multiple hit theory.

1 Q. Do you agree with that?
2 A. Yes, I do.
3 Q. And the multiple hits can come from what different
4 sources, please, sir?
5 A. From essentially multiple sources. Genetic.
6 Q. Would be one?
7 A. Genetic.
8 Q. Excuse me one second, if I may.
9 MR. SMITH: Bryan, do you want to give me a
10 hand? I think this -- I don't want to mess up your back.
11 MR. McLAUGHLIN: You know, your concern for
12 me is overwhelming.
13 MR. SMITH: Your Honor, is that okay?
14 THE COURT: Fine.
15 MR. SMITH: May I approach the easel?
16 THE COURT: Please.
17 MR. SMITH: Okay.
18 THE COURT: You might use the mike, just to
19 help out, Mr. Smith. If we can find it.
20 MR. SUFFERN: Dr. McCue, do you still have
21 the mike, Dr. McCue? The microphone.
22 MR. SMITH: Thank you, sir.
23 BY MR. SMITH:
24 Q. The first one we might list would be genetics, sir?
25 A. Yes.

1 Q. What would another one be, please?
2 A. There's a broad class I would list as environmental.
3 Q. And when you use that word, you mean what, please?
4 A. Environmental could be all types of exposures:
5 Cigarettes, asbestos, noxious chemicals.
6 And then I would also list something you can
7 do, you can group under -- I would also list what I would
8 call lifestyle as a big one.
9 Q. As a big one?
10 A. Yeah, lifestyle meaning what you eat, what you drink,
11 types of foods.
12 Q. Okay.
13 A. Radiation exposure which can be either environmental
14 or iatrogenic.
15 MR. COFER: How do you spell that?
16 Q. Do you want to spell that, please?
17 A. I-A-T-R-O-G-E-N-I-C. That just means caused by a
18 doctor.
19 Q. Any others, Dr. McCue?
20 A. I'm sure I could think of a lot, but those are the
21 biggies.
22 Q. Those would be the biggies.
23 Can each of these provide a hit in this
24 sequence under the multiple hit theory?
25 A. Yes.

1 Q. Can some of them provide more than one hit?
2 A. Yes.

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3 Q. Is there any agreement as to the number of hits it
4 takes for the final event to occur, so to speak?
5 A. There is a minimum of two.
6 Q. Okay.
7 A. We don't know the maximum.
8 Q. Okay. That's still being determined?
9 A. Yes.
10 Q. Is there a range that's in debate at the moment as to
11 the maximum?
12 A. Again, some people say five, some people say nine.
13 Yes, there is a -- there is a debate.
14 Q. Okay. And do different types of cancers, is there a
15 debate over how many hits it takes for different types of
16 cancers to evolve?
17 A. Yes.
18 Q. Is there a debate regarding the lung cancers?
19 A. Yes.
20 Q. And what is that debate, as you understand it, as far
21 as range goes, Dr. McCue?
22 A. I would say again more than two, less than nine.
23 Q. Okay. So at this moment in time, the debate among
24 different camps is somewhere between two and nine, as best
25 you understand it?

1 A. Yes.
2 Q. Okay. The hits, can they occur at different time
3 periods?
4 A. Yes.
5 Q. And can they range with -- can there be a significant
6 amount of time between them, in your view?
7 A. In my view, yes. But not an infinite number, not an
8 infinite time period, because the body does renew itself.
9 Q. Is it your belief that once a -- there is a
10 chromosomal damage, that it can take care of itself, repair
11 and it will be not a problem and not be involved with the
12 multiple hits?
13 A. It depends upon the damage, and again it depends upon
14 the time sequence.
15 Q. Okay. And is this an area then that's also in
16 debate, in your opinion? Or is this decided as far as you
17 are concerned?
18 A. Well, the details are in debate, but the theory is
19 fairly well-decided.
20 Q. And also, does it depend upon the severity of the
21 original hits insofar as whether they are, in fact,
22 repairable?
23 A. Severity and number of cells involved.
24 Q. Okay. Is it your view that some of these can combine
25 with each other to give a bigger hit than they would by

1 themselves?
2 A. No.
3 Q. You think there's no combination thereof that can
4 cause the hit to be more severe?
5 A. I think the hits can be sequential and they will hit
6 at different points, but can you, like, speed up one, I
7 don't -- I don't think that that mechanism has been really
8 proven.
9 Q. Okay. But you are not saying it doesn't exist.
10 You are just saying it hasn't been proven as
11 far as you are concerned?

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12 A. Correct.
13 Q. Is that fair?
14 A. (Nods affirmatively).
15 Q. Yes, sir?
16 A. Yes.
17 Q. There's some people that think one type of hit can do
18 something to the cell that may make it more vulnerable to a
19 hit from another type of substance, take it to the next
20 stage?
21 A. I agree with that.
22 Q. Okay. There -- you indicated, I think, reliance on
23 the 1990 Surgeon General's report?
24 A. Yes.
25 Q. I think you referenced it in your report even, is

1 that true?
2 A. Yes.
3 Q. Would you agree that former smokers -- well, let me
4 approach this actually in a more scientific basis. I'm
5 going to try to. I'm not saying that I can, but I'm going
6 to try to see if we can do that.
7 Once one of these hits occurs, some of these
8 hits are not repaired to the point where they are no longer
9 in play in this process. They may or may not be. That's a
10 question of each individual situation.
11 Would that be fair?
12 A. Yes.
13 Q. And so if that happens, then if later on the final
14 step in the cancer occurs, would it be your belief that
15 each one of the events that caused that stepping process to
16 occur would be a player?
17 A. Yes.
18 Q. And it is my understanding that the longer you quit
19 smoking, the longer the statistical graph goes down insofar
20 as the odds of your coming down with lung cancer are
21 concerned?
22 A. Yes.
23 Q. But it's also my understanding that as far as the
24 current literature is, at any rate, it never does arrive at
25 zero?

1 A. Correct.
2 Q. In fact, I believe there's even literature -- at
3 least I think I've seen graphs -- wherein after it goes
4 down for a long period of time, there eventually comes a
5 time where the graph of the former smoker begins to go up a
6 little?
7 A. I am not familiar with that, but I know that people
8 who do the statistics on these things get very involved in
9 the mathematics, and I'll have to take a by on that one.
10 Q. Have -- excuse me one second.
11 Insofar as what form of cancer is the
12 greatest form of cancer in the United States? It is which
13 one?
14 A. In terms of lung cancer?
15 Q. Of any types of cancer.
16 Is lung cancer, put it another way, is lung
17 cancer the largest creator of cancers of any type?
18 A. In males, lung cancer leads the list.
19 Q. In fact, is there some reference in here where it may
20 even top the next three in total?

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21 A. Well, that's from 1990.
22 Unfortunately now that we have PSA, prostate
23 cancer diagnoses, it's gone sky high.
24 Q. So it might not top the total of the next three?
25 A. Correct.

1 Q. Okay. Incidentally, that is this question: Before
2 the advent of the cigarette, is it true -- or when I say
3 the advent of the cigarette, the cigarette began about
4 when, as you understand it?
5 A. I'll take a by on that because I know people were
6 smoking tobacco when the Pilgrims arrived so.
7 Q. But as far as when the cigarette happened, you are
8 going to take a by?
9 A. Yeah, I don't know that.
10 Q. If I -- if someone were to say to you that the
11 cigarette manufacturing process where there were very many
12 of them made happened somewhere in the late 1880s and
13 1890s, would you quarrel with that?
14 A. Yes, I -- that's reasonable.
15 Q. Okay. Is it your understanding that back in the
16 early 1900s when the lung cancer showed up, that it was
17 really a rare event?
18 I mean, a pathologist might call other
19 pathologists in to even see one?
20 A. Correct.
21 Q. And that the graphing of the lung cancers has been
22 graphing up at least up until -- about what point in time
23 would you say that it quit graphing up?
24 A. Well, when the government started warning people to
25 stop smoking.

1 Q. Do you think it originally that -- that was the first
2 time -- well, by "stop smoking," you mean saying what to
3 them?
4 A. Smoking can cause -- I think the original -- I'm
5 paraphrasing, but the original warning was smoking can be a
6 danger to your health.
7 And then it got stronger.
8 Q. And did -- didn't, in fact, the lung cancer rate
9 continue to climb even after 1964?
10 A. Again, I don't know that.
11 Q. Okay. And is it your understanding that as -- over
12 time, as the lung cancer rate was growing, you could factor
13 in the amount of cigarettes being manufactured with another
14 curve, and if you fed in a latency time or a time period,
15 that those two graphs would be similar?
16 A. Yes, that's reasonable.
17 Q. Okay. So I'm assuming from that, that it is your
18 belief that cigarettes are the greatest cause of lung
19 cancer known to the human race?
20 A. Yes.
21 Q. Cigarettes kill about how many people a year?
22 MR. SUFFERN: Objection, Your Honor. That's
23 beyond the scope of the direct.
24 THE COURT: Sustained.
25 Q. As far as smoking goes, I believe you -- your wife

1 has smoked, is that true?
2 A. That's correct.

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3 MR. SUFFERN: Objection, your Honor. Beyond
4 the scope of the direct as well.
5 THE COURT: Whether his wife smokes or
6 doesn't smoke is not relevant here.
7 MR. SMITH: Okay.
8 THE COURT: This case focuses on the claims
9 of the plaintiff, and the smoking habits or the lack of
10 same of other people are simply not relevant.
11 Let's move on.
12 BY MR. SMITH:
13 Q. You -- I want to ask you if you agree with a few
14 statements, if I might.
15 You probably -- do you have the book of
16 Pathology of the Lung by Thurlbeck and Churg?
17 A. Yes.
18 Q. Do you consider it authoritative?
19 A. It's a good textbook.
20 Q. I'm not saying you agree with every sentence in it,
21 but it is a good book?
22 A. Yes.
23 Q. It's one of the books you consult for advice?
24 A. Right. But I don't know all those pages in that big
25 book.

1 Q. This isn't -- I understand.
2 I want to ask you if you would agree with
3 this statement: That approximately 90% of lung cancers in
4 men are directly attributable to smoking?
5 A. Almost. I would put the number between 80 and 90.
6 Q. Would you agree with this statement, and I'm on Page
7 438 in the second edition.
8 In the right-hand column, second full
9 paragraph, "Prospective cohort studies show that the risk
10 of lung cancer for male smokers is 22 times that of
11 nonsmokers."
12 A. I agree with that.
13 Q. Would you agree with that statement on Page 445, and
14 that "The phenotype of a particular lung cancer depends on
15 the specific genetic abnormalities present and not on the
16 features of an alleged specialized cell of origin"?
17 A. Could you repeat that?
18 Q. Yes, sir.
19 A. Because I'm not quite sure what it means.
20 Q. I'll read the whole sentence. I tried to shorten it
21 but just so you get -- that may have not been fair.
22 "All of these observations" --
23 THE COURT: Read slowly, please.
24 MR. SMITH: I'm sorry.
25 Q. "All of these observations are consistent with the

1 hypothesis that all cell types are derived from a common
2 precursor, and that the phenotype of a particular lung
3 cancer depends on the specific genetic abnormalities
4 present and not on the features of an alleged specialized
5 cell of origin."
6 A. I don't think I agree with that.
7 Q. Okay. Would you agree with this statement?
8 That was on Page 445, left-hand column, first
9 paragraph.
10 This is the first right below it. I'm taking
11 a sentence out of the middle in the interest of time.

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12 Would you agree, this approach allows -- and
13 it talks about molecular genetics, and it -- detection of
14 protein products and things of that type.
15 Then it goes on to this sentence: "This
16 approach allows identification of molecular markers in a
17 lung tumor using the light microscope and techniques
18 already available in most surgical pathology laboratories."
19 A. I agree with that.
20 Q. You provided me with some articles that were on your
21 reliance list, is that right, sir?
22 Do you recall that?
23 A. Yes.
24 Q. Anyway I have them.
25 Do you recall it?

1 A. Yes.
2 Q. You cited to the article of Early Detection and
3 Prevention of Lung Cancer by Wright and Gruidl, does that
4 sound right?
5 A. Yes.
6 Q. And there's a sentence, "Lung cancer is the leading
7 cause of cancer death among both men and women in the
8 United States, and it is one of the world's leading causes
9 of preventable death. There are a variety of factors that
10 contribute to lung cancer risk. However, the strongest
11 association with lung cancer etiology or etiology is
12 tobacco smoking, particularly smoking cigarettes."
13 That is -- do you agree with that?
14 A. Yes.
15 Q. Now, also I want to go to the article, the third page
16 of that article. It's on Page -- in copy, I can't tell you
17 the page except it's the third page of the article,
18 right-hand side, and it's under the heading of loss of
19 heterozygosity.
20 It's an article I received from you, right?
21 A. Okay.
22 Q. Does that sound right, sir?
23 A. Yes.
24 Q. Okay. And it says here: "Loss of heterozygosity
25 determines whether one, both or neither allele of the gene

1 are present at a specific locus. Loss usually suggests --"
2 MR. SMITH: May I approach the easel, Your
3 Honor?
4 THE COURT: Yes.
5 Q. "Loss usually suggests that a deletion has occurred.
6 In current and former smokers, loss of heterozygosity is
7 seen in chromosomes 3P and 9P."
8 Do you agree with that statement?
9 A. Yes.
10 Q. And then it goes on to say "And less frequently on
11 3Q, 17P and 13Q."
12 Do you agree with that, sir?
13 A. Yes.
14 Q. Do you recall the date of this article?
15 A. No, I do not.
16 Q. I have it over here. It appears to me that it was
17 written in August of 2000.
18 Would that sound in the ballpark?
19 A. Yes.
20 Q. Okay.

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21 MR. SMITH: May I use you folk's easel?
22 MR. SUFFERN: Sure.
23 BY MR. SMITH:
24 Q. Dr. McCue, is that okay distance-wise? Can you see
25 it?

1 A. Yes.
2 Q. To take away any mystery about it, have you seen this
3 board since you have been here?
4 A. No, but surprisingly I recognize the chart.
5 Q. Okay. From the article this year?
6 A. Yes.
7 Q. Okay. And for the colors, blue represents smokers or
8 former smokers, red represents nonsmokers?
9 A. Correct.
10 Q. Does that strike your recollection of the chart?
11 A. Yes.
12 Q. Now, in this case, Dr. Sidransky studied 3P, 9P, 17P
13 and 19P.
14 I don't know if you are familiar with that or
15 not. Has anyone discussed that with you, sir?
16 A. I read his expert report.
17 Q. Okay. So you are aware of that?
18 A. Yes.
19 THE COURT: May I just take a second to speak
20 with counsel at side-bar?
21 MR. SMITH: Yes, sir.
22 (Proceedings at side-bar:)
23 THE COURT: There is a time yesterday when
24 there was an objection, as I understood it, by plaintiff's
25 counsel to the anticipated testimony of a defense expert

1 about Dr. Sidransky, and I don't remember whether it was
2 McCue or somebody else when that issue was raised.
3 And I said at that time that -- there was
4 spirited discussion -- that I would voir dire that to some
5 extent before I would allow the defendants to question an
6 expert about Dr. Sidransky in view of the fact that the
7 written expert report of that particular witness did not
8 mention Dr. Sidransky.
9 Now, I don't remember any more, was it McCue
10 or somebody else?
11 MR. SUFFERN: It was, Your Honor. And that's
12 why I avoided it in my direct.
13 THE COURT: Well, you asked him about LOH,
14 but you did not ask him about heterozygosity.
15 MR. SUFFERN: That's right.
16 MR. SMITH: Russ, the point I want to make
17 with you is the moment you start down the Sidransky path, I
18 will let them redirect him about Sidransky, what he wants
19 to ask about Sidransky.
20 You had raised an objection to any
21 questioning of McCue about Dr. Sidransky. You are going
22 the same place.
23 So once you go there, then I'm not going to
24 restrain them from inquiring about this expert -- of
25 Dr. McCue about his view of Sidransky.

1 MR. SMITH: Thanks for warning me.
2 THE COURT: I'm not sure you understand that.

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3 MR. SMITH: I appreciate it.
4 MR. COFER: This does not need to be on the
5 record.
6 (Discussion had off the record).
7 MR. SUFFERN: Your Honor, I want a
8 clarification.
9 THE COURT: Sure.
10 MR. SUFFERN: Has he already opened the door
11 by putting the chart up, or are we going to withhold
12 judgment on that?
13 THE COURT: Let's see what question he asks.
14 I think he's opened the door, unless he suddenly closes it.
15 MR. SUFFERN: Thank you.
16 THE COURT: Okay.
17 (End of side-bar conference).
18 THE COURT: You may continue.
19 MR. SMITH: Yes, sir.
20 BY MR. SMITH:
21 Q. Dr. McCue, you indicated I believe the chromosomal
22 arms that you had in your material, that the author of the
23 material thought were appropriate to test, and you've
24 indicated you agree with that author, is that correct?
25 I'm not trying to put words in your mouth.

1 A. Agree with?
2 Q. The 3P, 9P, 3Q, 17P and 13Q that were mentioned in
3 this article you gave me?
4 MR. COFER: Which? Could you identify the
5 article?
6 MR. SMITH: Yes, sir.
7 MR. COFER: I think that's the confusion
8 because of what's lapsed.
9 MR. SMITH: Sure.
10 BY MR. SMITH:
11 Q. I'm referring to the article by Wright and Gruidl on
12 the third page.
13 Let's show it to you.
14 A. No. No. I know the article.
15 You're asking me whether these are good genes
16 to test for?
17 Q. Yes, sir.
18 A. I agree that they are interesting genes to test for.
19 Do I agree that they are specific for
20 causation of lung cancer from tobacco smoke? No.
21 Q. And when you say "specific," you mean what?
22 A. Well, because I work in the field of 3P, I know that
23 3P is deleted in other cases that have nothing to do with
24 cigarette smoke or not even necessarily cancer.
25 So these genes that they are looking for are

1 fragilocytes, and because they are fragile they break. And
2 they break under lots of different circumstances.
3 They are good to test for. But are they
4 absolute? I don't agree with that.
5 Q. All right. And I understand.
6 A. Okay.
7 Q. And let's see if I understand, see if I truly
8 understand what you are saying.
9 You are saying that a particular gene can be
10 fractured by different attacks from different substances?
11 A. Correct.

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12 Q. But when in this article they put those five
13 together, with the first two being the prime two as I read
14 the article.
15 Is that true?
16 A. Yes.
17 Q. So when they do that, they are putting a pool
18 together to try to look for a particular assaulting force,
19 is that correct?
20 A. Correct.
21 Q. And do you ascribe to -- I'm not saying you agree
22 with these particular ones being the ones selected to do
23 that, but do you subscribe or do you agree with that
24 approach?
25 A. I think it's an interesting approach.

1 Q. Do you think that's a good thing to be trying?
2 A. It's a good thing to be trying. I think the key word
3 is "Try."
4 Q. And you are not so sure -- you are waiting to see,
5 the jury is still out in your mind as to whether or not it
6 works, would that be fair?
7 A. It needs to be -- this is only one test, correct.
8 Q. Okay. But if you were going to be one of those
9 people testing it, would those five genes be ones that
10 would seem sensible to you to test for?
11 A. Yes.
12 Q. You take -- withdraw that. Word this a little
13 better.
14 You believe that if a site of a tumor has
15 been treated with radiation, that it is no longer usable
16 for these changes, or am I putting -- saying it improperly?
17 A. I think that we could actually do that test, but I
18 think without doing the experimental evidence, my opinion
19 would be that since you are causing damage, and that these
20 genes are fragile, that you've run the risk of prejudicing
21 your results.
22 Q. And let me ask this question, I guess in fairness to
23 both of us: From what I -- I thought you just said you
24 haven't run the test to determine if that's actually the
25 fact, but it is your belief that that is what a test would

1 show?
2 A. Correct.
3 Q. Okay.
4 MR. SMITH: That's all I have. Thank you.
5 THE COURT: Redirect.
6 REDIRECT EXAMINATION OF PETER McCUE
7 BY MR. SUFFERN:
8 Q. Dr. McCue, where is that chart that Mr. Smith just
9 published to the jury? Where is it from?
10 A. That's from the Journal of Cancer Research.
11 Q. And what did you -- you recall an article, that
12 that's from an article in that journal?
13 A. Yes.
14 Q. Do you know who the authors of that article were?
15 A. Well, I think he mentioned the first two, and I think
16 the last author was Dr. Sidransky.
17 MR. SUFFERN: Your Honor, I have a copy of
18 Plaintiff's Exhibit 2277.001.
19 May I approach the witness?
20 MR. SMITH: May we approach the bench?

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21 THE COURT: Why not?
22 (Proceedings at side-bar:)
23 THE COURT: I don't know what the exhibit is.
24 The fact it's been marked by the plaintiff doesn't mean
25 it's in evidence.

1 MR. SUFFERN: This is Dr. Sidransky's paper
2 that he put up on the board there, a chart from.
3 I would like to ask Dr. McCue about another
4 chart from that same paper.
5 The issue is whether the door is opened by
6 Mr. Smith showing a chart from Dr. Sidransky's paper to the
7 witness.
8 We would -- our position is that it is. If
9 it's not, Your Honor, I'll move on to something else.
10 MR. SMITH: I just asked him if he saw it,
11 and I shut up.
12 I was warned --
13 THE COURT: Well, the problem is you already
14 published it.
15 I'm not going to stop him. I'm going to let
16 him go ahead, so if you have an objection to him asking
17 about the Sidransky report, objection is overruled.
18 MR. SMITH: Okay.
19 (End of side-bar conference).
20 BY MR. SUFFERN:
21 Q. Dr. McCue --
22 MR. SMITH: May I see it?
23 MR. SUFFERN: I'll get to it in just a
24 second, Russ. You have seen it. It's in this paper.
25 May I approach the witness, Your Honor?

1 THE COURT: Sure.
2 MR. SUFFERN: Here, Mr. Smith.
3 Dr. Sidransky's paper.
4 Dr. McCue. (Handing).
5 Your Honor, would you like a copy?
6 Q. Dr. McCue, would you please tell the jury if you
7 recognize that exhibit that I just handed you?
8 A. Yes, I do.
9 Q. Can you tell them what it is, please?
10 A. It's the paper that we've been discussing here on the
11 charts.
12 Montserrat is the lead author. It has to do
13 with chromosomal breaks in lung cancers from smokers and
14 nonsmokers. It was published in Cancer Research this year.
15 Q. This is the paper by Dr. Sidransky in which he
16 reports on his study of deletions on some of the short arms
17 of these chromosomes that we have been discussing, is that
18 correct?
19 A. Correct.
20 Q. I'd like to draw your attention, please, to the
21 fourth page of the report.
22 I'm going to ask you if you've seen the
23 Fig. 3 that appears on that fourth page. It's Plaintiff's
24 Exhibit 2277.004, and it's Page 1312 of Dr. Sidransky's
25 paper.

1 Have you seen that before, Dr. McCue?
2 A. Yes.

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3 Q. Can you explain to us if that in any way --
4 MR. SUFFERN: Well, let me ask permission to
5 show it to the jury, Your Honor.
6 THE COURT: Proceed.
7 MR. SUFFERN: Thank you.
8 Q. Dr. McCue, will you tell the jury what significance,
9 if any, to your opinions in this case this Fig. 3 has from
10 Dr. Sidransky's report?
11 A. Well, this figure comes from the discussion section
12 of the report where they -- the group tries to summarize
13 what they feel is going on in patients that are smokers and
14 nonsmokers.
15 And it's interesting -- although it's in very
16 small type in the paper and it's hard to make out -- if you
17 look at it, it's kind of interesting because if you try to
18 fit Mr. Tompkin into their scheme, which I -- it may not be
19 valid to do that, but if you do, he seems to fit more in
20 the nontobacco-related group according to Dr. Sidransky's
21 scheme because he has negative P53 and K-Ras.
22 In the smoking-related scheme, Dr. Sidransky
23 has no people that have both negative K-Ras and negative
24 P53.
25 So if you're speculating or reading into this

1 data, you would certainly put Mr. Tompkin in this side, and
2 according to Dr. Sidransky this would be the
3 nontobacco-related group of lung cancers.
4 Q. Let's see if I have it, Dr. McCue.
5 You are saying that because there were
6 negative P53 and negative K-Ras in Mr. Tompkin, that he
7 falls into, under Dr. Sidransky's own paper, the
8 nontobacco-related side of the chart, is that what you are
9 saying?
10 A. That's the way I read it, because I can't read any
11 corresponding patient, either in the chart or on the test,
12 that would correspond to Mr. Tompkin's medical findings.
13 Q. Thank you, Doctor.
14 Just two more questions.
15 You are not here to tell the jury, in fact on
16 direct you told the jury, smoking cigarettes causes a lot
17 of lung cancer, doesn't it, Dr. McCue?
18 A. I would agree with that statement.
19 Q. But your opinion is that it just didn't cause David
20 Tompkin's lung cancer, is that correct, sir?
21 A. I could not find any pathologic or biochemical
22 connection in the material that I studied or in the studies
23 that I read from the expert reports.
24 MR. SUFFERN: Thank you.
25 THE COURT: Any additional recross?

1 MR. SMITH: Yes, Your Honor.
2 May I approach the bench before I ask a
3 question?
4 (Proceedings at side-bar:)
5 MR. SMITH: I'm just trying to make sure that
6 I -- I want to defend this, what has just been raised,
7 without being accused of opening the door further.
8 I want to -- I do want to present the
9 confines of this report. I'd like to go back at it with
10 him. That's my request.
11 THE COURT: You can do that. Yeah.

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12 MR. SMITH: Thank you.
13 THE COURT: You opened the door a little bit,
14 he opened it wider, and as far as I'm concerned it's fair
15 game.
16 MR. SUFFERN: Thank you, Your Honor.
17 (End of side-bar conference).
18 RECROSS-EXAMINATION OF PETER McCUE
19 BY MR. SMITH:
20 Q. Those are the four changes that we are talking about
21 here insofar as referring to Dr. Sidransky.
22 THE COURT: You ought to put it in the record
23 because nobody reading the record will have any idea what
24 you are talking about.
25 Q. 3P, 9P, 17P and 19P, is that correct?

1 A. Correct.
2 Q. And three of the five are in the paper that you told
3 us about earlier, is that correct?
4 A. Correct.
5 Q. Have I circled the right ones, 9P, 17P, 19P and 3P?
6 A. Yes.
7 Q. And again, the blue represents smokers, the red
8 represents nonsmokers, is that correct?
9 A. Correct.
10 Q. Do those four appear to you to be reasonable
11 candidates to use to make such a test?
12 A. Yes.
13 Q. My -- I don't want to write on your exhibit, so I
14 guess I won't.
15 MR. SUFFERN: No, Russ, I'm sorry, go ahead.
16 Write on my -- go ahead. Feel free. Absolutely.
17 Q. (Marking). Dr. McCue, on the exhibit that's just
18 been referred to, under the tobacco-related side of that,
19 when it comes down to high FAL index, chromosomal
20 alterations, isn't it true that all four of those are
21 listed within that grouping?
22 A. Yes.
23 Q. I'll talk loud. All right. Oh, thank you,
24 Dr. McCue.
25 A. (Handing).

1 Q. Is it true that all four of those have a good -- I'm
2 sorry -- that all four of those have a good distinction
3 between smokers and nonsmokers?
4 A. In this study, yes.
5 Q. And is it true that in those four studied, there were
6 three hits on that -- is that your understanding?
7 A. Yes.
8 MR. SMITH: Where are the other boards?
9 That's a great way to whisper.
10 (Laughter).
11 MR. SMITH: For my next trick -- I apologize.
12 MR. COFER: What are you looking for?
13 MR. SMITH: Well, we have boards on the other
14 graphs but didn't want to bore the jury.
15 May I please put copies of this on the Elmo?
16 THE COURT: Sure.
17 MR. SMITH: Thank you, Your Honor.
18 MR. COFER: I've got to move.
19 MR. SMITH: Those mikes are dangerous.
20 For the record, Your Honor, should we mark

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21 these as exhibit numbers?
22 THE COURT: Probably be a good idea.
23 MR. NACE: Russ, they already have a number;
24 they should.
25 MR. SMITH: May it please the Court, we are

1 referring to the chart on the left side of Plaintiff's
2 Exhibit 2277.003, although I think it's made quicker in
3 Table 2 which is just to the right of that, forgive me.
4 Table 2 on 2277.003.
5 BY MR. SMITH:
6 Q. This is another table in that report, is that
7 correct, Dr. McCue?
8 A. Yes.
9 Q. And would you read what it says after Table 2,
10 please?
11 A. "Comparison between frequency of LOH and allelic
12 imbalances in the two groups of lung adenocarcinoma from
13 smokers."
14 Q. And the first one listed, please, is what?
15 A. Chromosome arm.
16 Q. And the one under the first one under that column?
17 A. 9P.
18 Q. And the next one listed under that arm, please?
19 A. 19P.
20 Q. And the next one listed?
21 A. 17P.
22 Q. And then if you skip two, you go to which one?
23 A. 3P.
24 Q. So would it be true to say, then, that four of the
25 ones tested were in the top six as listed there as far as

1 showing the frequency of LOH?
2 A. Yes.
3 Q. And there's no mystery about the other table, but it
4 just lists them on Table 1 on that exhibit, it just lists
5 them sequentially by number, is that correct?
6 A. Correct.
7 Q. So if you were to view the fact that there were
8 three, three of those four selected had hits, would you say
9 that was consistent with a smoker?
10 A. In any patient, or Mr. Tompkin?
11 Q. Well, I'm trying to ask you to use the -- bring the
12 same brain power to it that you did when you looked at the
13 other table.
14 A. If I was looking at the patients in this study, I
15 would agree with you.
16 Q. Okay. That's where you came -- that's what you were
17 doing in the red marks on that other table, is that
18 correct?
19 A. Correct.
20 Q. So you would -- you would agree with this, then, as
21 being a way to show a smoker?
22 A. Yes.
23 MR. SMITH: That's all I have.
24 Thank you, Your Honor.
25 THE COURT: Thank you. More direct?

1 MR. SUFFERN: Very briefly, Your Honor.
2 FURTHER REDIRECT EXAMINATION OF PETER McCUE

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3 BY MR. SUFFERN:
4 Q. Dr. McCue, a moment ago when Mr. Smith asked you a
5 question about Dr. Sidransky's study, you drew a
6 distinction between Mr. Tompkin and the 45 people who were
7 studied in Dr. Sidransky's paper.
8 Would you explain why you drew that
9 distinction to the jury, please?
10 A. Well, the question was were the chromosome deletions
11 a good marker for a smoker?
12 And the answer is, based upon this paper, and
13 the preliminary data, it seems like a reasonable point of
14 view.
15 However, since we know more about Mr. Tompkin
16 than we do about these people in this paper, and in fact
17 there is -- if you look at the patient populations, what
18 the epidemiologists call a cohort -- this is a group of
19 people that are studied which have to be similar --
20 Mr. Tompkin does not belong in this cohort or in this study
21 population because, A, he's got a negative K-Ras and
22 negative P53; B, he's got this heavy asbestos and silicate
23 exposure which was not controlled for in this study. They
24 had none of the same risk factors. And, C, they had no one
25 in the study that quit smoking for 25 years.

1 There are a lot of other problems with the
2 cohort that they didn't control for: Diet, drinking, where
3 they lived. Some of the people in the control studies were
4 from Spain. I'm not quite sure when you are dealing with
5 these differences whether there are even chromosomal
6 differences between the people in Spain and the people in
7 Akron, Ohio, Cuyahoga Falls. I don't know that. I'm not
8 saying that there are, but I don't know.
9 But these are all the types of things that
10 you hire experts to look at to control for. If you don't
11 do the right controls, you can't get the right conclusions.
12 And so all I'm saying is that from my
13 reading, Mr. Tompkin doesn't fit into the study.
14 Q. Is it fair to say that what Dr. Sidransky is trying
15 to do with this paper is set forth a hypothesis about how
16 you might someday get at smoking-related causes of lung
17 cancer?
18 A. I think that's exactly what he's doing.
19 Q. What is a hypothesis, Dr. McCue?
20 A. Hypothesis is probably best described as an untested
21 theory.
22 It states a fact. It states a tentative
23 theory, unsupported. But it gives you a framework from
24 which to operate from.
25 And the one thing about a hypothesis is that

1 you've got to be willing to either prove it or disprove it.
2 Q. How do you prove a hypothesis like this in science?
3 A. Well, you would have to study people with the similar
4 characteristics of Mr. Tompkin, asbestos, quartz,
5 silicates, low -- previous smoking but then quit. You need
6 the right control.
7 And again, controls are so very important.
8 If you compare, say, a little leaguer in a town of 500
9 people and he's really great, and then you move him to the
10 big city, he may not be so great when compared to his
11 normal controls.

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12 So it really depends upon which end you are
13 looking at this from.
14 And from my critical reading of the
15 literature, Mr. Tompkin kind of fell out of the study;
16 doesn't belong here.
17 Q. Mr. Smith circled 17P here.
18 Are you aware of whether Mr. Tompkin's test
19 was positive or negative for LOH at 17P?
20 A. I believe it was negative.
21 Q. Mr. Tompkin displayed LOH at 9P, isn't that correct?
22 A. Correct.
23 Q. It's just a hypothesis, isn't it, Dr. McCue?
24 A. Yes, it's a starting point and it's very interesting
25 work, but I think you have to realize, it's the first test

1 or the first published paper on this issue. Small cohort,
2 I think 27 smokers and 18 nonsmokers, and they need better
3 controls.
4 MR. SUFFERN: Thank you, sir.
5 MR. SMITH: May I ask one more question, Your
6 Honor?
7 THE COURT: Why not?
8 MR. SMITH: I appreciate it.
9 THE COURT: Go ahead.
10 FURTHER RECROSS-EXAMINATION OF PETER McCUE
11 BY MR. SMITH:
12 Q. Dr. McCue, I believe you stated earlier in your
13 testimony that you agreed with the markers selected
14 for -- in this following sentence, in the paper you gave to
15 me.
16 "In current and former smokers, loss of
17 heterozygosity is seen in chromosomes 3P and 9P and less
18 frequently on 3Q, 17P and 13Q."
19 Is that correct?
20 A. Correct.
21 Q. And those are these five right here, is that correct?
22 A. Correct.
23 Q. And in Dr. Sidransky's study, the only thing he did
24 different than the paper that you said is valid science was
25 substitute -- use 19P and not use 3Q and 13Q, is that true?

1 A. Not exactly.
2 Q. Change it, please.
3 A. Well, he -- the markers are true, but the starting
4 point, the tissue he used was authored, and I also have a
5 problem with that. And I can't tell from the paper whether
6 he looked at cancer that was native or virginal or whether
7 it was treated cancer, but I know in Mr. Tompkin's case he
8 did use cancer that was post-treatment.
9 But in terms of the chromosomes, I agree with
10 you.
11 Q. And it is not a hypothesis in your mind in terms of
12 the chromosomes, is it?
13 A. Correct.
14 MR. SMITH: Thank you.
15 MR. SUFFERN: Nothing further, Your Honor.
16 THE COURT: You may step down.
17 (Witness excused).
18 THE COURT: We will take about a 15 minute
19 break.
20 Would counsel remain, please?
21 (Jury out).

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22 THE COURT: Who's the next expert?
23 MR. COFER: Your Honor, if you would give us
24 about five minutes to caucus, then I can tell you exactly
25 the answer. The answer is maybe no one, if you'll let me

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1 talk to my colleagues.
2 THE COURT: Well, what I'm needing -- Russ
3 needs to know is whether you are going to quit or not quit,
4 and he's got to get ahold of his witness, and I have to
5 tell the jury what's going on.
6 MR. COFER: If you'll give me three minutes.
7 THE COURT: No, go ahead. Take the time.
8 (Recess taken).
9 MR. COFER: Your Honor, we are prepared to
10 rest in front of the jury, but we need an opportunity to
11 move in our exhibits. I don't know whether you
12 want -- whether we can move in our exhibits after we rest
13 in front of the jury, before we formally rest, or how do
14 you want to handle that?
15 THE COURT: I don't care.
16 MR. COFER: Okay. If there's no problems,
17 Mr. Smith, what we will do is when the jury returns, we
18 will have interim argument, we will then rest in front of
19 the jury, and then after the jury is gone, we can deal with
20 the exhibits at your Honor's pleasure.
21 THE COURT: What I want Russ to do is find
22 out what's going on with his doctor.
23 Is Dr. Whelan going to be your only rebuttal
24 witness or do you have other rebuttal?
25 MR. SMITH: Yes, sir.

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1 THE COURT: Only one, right?
2 MR. SMITH: Yes.
3 THE COURT: See what's going on. That's why
4 I took a 15-minute recess, to give you some time.
5 MR. SMITH: I don't know about the Court's
6 view on the Heimann depo. If it's possible to play it, we
7 would like to.
8 THE COURT: I'm not sure -- they haven't
9 fought you. The only thing they are fighting you on is
10 proximate cause. They have thrown in the towel, in fact
11 you may be entitled to a directed verdict on the defect of
12 the product, absent an issue of warning.
13 (Recess taken)
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1704

1 THE COURT: Let the record show the jury is
2 not in the courtroom. The defendants are ready to
3 rest. They would like to rest in front of the jury.
4 We still have to handle the defendants' exhibits, so
5 when they rest it will be with the understanding that
6 they will have the opportunity to move their exhibits

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7 after they have, quote, rested.
8 And I assume that's okay with everybody,
9 the plaintiff?
10 MR. SMITH: Yes, sir.
11 THE COURT: And then I'm going to tell them
12 to come in 11:00 o'clock tomorrow morning. I'm going
13 to tell them I have a number of matters I need to
14 review, I don't think I'll get it done in time to
15 start at the normal time.
16 And it is only once they get here at
17 11:00, I need a little more time. But trying to get
18 the most out of the date, I'll tell them 11:00
19 o'clock.
20 MR. COFER: What is the appropriate time to
21 renew our motion for directed verdicts?
22 THE COURT: After they finish their rebuttal.
23 You can't do it until they finish their rebuttal.
24 MR. SMITH: Is the court planning on closing
25 on Tuesday?

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1 THE COURT: I am now depending on what
2 happens here, because we were going to hand out the
3 instructions tonight. I'm giving serious thought to
4 instructing the jury and start arguing.
5 MR. SMITH: Tomorrow afternoon possibly.
6 THE COURT: Depends now on what you do.
7 MR. SMITH: I was just trying to have my head
8 on where we are going.
9 THE COURT: I am not going to blow off
10 Friday. If all we get is final arguments and
11 instructions on Friday, I'll do that and send them
12 home until Tuesday.
13 MR. SMITH: So we'll argue tomorrow or
14 Friday.
15 THE COURT: That's another thing we need to
16 talk about.
17 MR. COFER: No, tomorrow or Thursday.
18 THE COURT: Tomorrow is Thursday.
19 MR. SMITH: That's the only thing you and I
20 have agreed on all week.
21 (The jury was returned to the courtroom and
22 the following proceedings were conducted in open
23 court.)
24 THE COURT: Please be seated.
25 Defense may proceed.

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1 MR. COFER: Thank you, your Honor. Members
2 of the jury, the defense rests.
3 THE COURT: That's true with all defendants?
4 MR. McLAUGHLIN: It is, your Honor.
5 MR. MILLIMAN: Defense rests.
6 MR. WALSH: Yes.
7 THE COURT: Members of the jury, one of the
8 great joys of being a trial lawyer is handling the
9 logistical problems that develop. And I believe
10 plaintiff's counsel had anticipated the defense would
11 not rest at this point, and the defendant now has -- I
12 mean the plaintiff now has the opportunity to present
13 rebuttal testimony, and that causes some difficulties
14 in arranging for the appearance of the witnesses.
15 As you probably have observed, I don't
16 think we've heard, other than the Tompkin family,
17 anybody that lives in Ohio in this case testify.

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18 Maybe there has been somebody else I forgot. I guess
19 there have been a couple people in Ohio that
20 testified. Many of the witnesses have been from out
21 of state, and as a result of that, I'm not going to
22 ask you to come in as early as I have in the past.
23 I'll ask that you be here by 11:00, and
24 possibly I'll be able to go forward. I may wind up
25 telling you, no, it will be a little later. But try

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1 to be here at 11:00 o'clock so we can continue with
2 the trial. Please drive safely. Please do not
3 discuss this case among yourselves. Do not read
4 anything about this case in the paper. If you should
5 happen to see something about the case, put it aside.
6 Do not listen to the radio that might touch on this
7 case. Do not view on the television that might view
8 in some fashion on this case. And we'll see you
9 tomorrow morning at 11:00 o'clock.
10 Thank you very much.
11 (The jury withdrew from the courtroom and the
12 following proceedings were conducted in open
13 court.)
14 THE COURT: Now Russ, in the interest of
15 time, would you have any objection if Brian stays here
16 and works with the exhibits, and possibly you go back
17 to the office and start scrambling on the deposition
18 as to whether you want to use that.
19 MR. SMITH: That would be fine, your Honor.
20 THE COURT: No sense in you sitting around
21 for that period of time.
22 And then I'll tell Brian when I want to
23 get together with counsel in the morning. I'm sure
24 there will be things I want to discuss.
25 One thing I would like to discuss now

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1 while Mr. Smith is still here. And that has to do
2 with the time for final argument.
3 This case is somewhat unique because both
4 of you, or all of you, engaged in final argument in
5 your opening statements, and so I don't know that you
6 need a whole lot of time. They have already heard the
7 argument once all they are going to do is hear it
8 repeated.
9 The rule of thumb that I follow is that
10 the plaintiff cannot use more time in the close than
11 is used in the opening statement. The opening
12 argument. And so the plaintiff will go first and then
13 the defendants have the opportunity to respond; and
14 then after all the defendants are through, then the
15 plaintiff has an opportunity to enter the final
16 argument.
17 I call this Dowd's anti-sandbagging rule
18 so that you cannot save, you know.
19 MR. SMITH: Yes, sir.
20 THE COURT: An inordinate amount of time for
21 rebuttal. The rule I follow is that you cannot use
22 more time in the close than you used in the opening.
23 MR. SMITH: Yes, sir.
24 THE COURT: So that if, for instance, you
25 used 10 minutes for your opening you've only saved ten

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1 minutes for your close, no matter how many much time I
2 have allocated.

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3 MR. SMITH: It is the actual, actual time
4 used.
5 THE COURT: Actual time on your feet. So you
6 are entitled to know the total amount of time to be
7 allocated. The defendants have to decide how to
8 divide up their time, and you have to decide how to
9 distribute your time between opening and closing.
10 So I'm ready now to hear argument about
11 how long I should allow for final argument, but I
12 would like, I would like to begin the process by
13 saying that in my view 90 minutes a side is
14 sufficient, given the fact you all made closing
15 arguments in your opening statements to begin with.
16 Can the defendants live with 90 minutes?
17 MR. COFER: Your Honor, I would ask for two
18 hours. That's how much time the court allocated for
19 opening statement. It is difficult predict how much
20 time the defendants will need. We have not seen the
21 jury instructions.
22 THE COURT: You are going to see them before
23 you make your opening argument.
24 MR. COFER: I understand your Honor is going
25 to change the jury instructions over what they were in

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1 the preliminary instructions.
2 THE COURT: I'm doing away with the
3 interrogatories.
4 MR. COFER: I don't know what the rebuttal
5 case is. I would ask, since there are four defendants
6 that we have two hours to split up among us.
7 THE COURT: Hundred minutes a side.
8 MR. COFER: How much?
9 THE COURT: 100.
10 MR. SMITH: We would have a motion to make
11 for directed verdict ourselves.
12 THE COURT: We are going to worry about that
13 after you do your rebuttal, it is premature.
14 Now, what I would like to do is handle
15 exhibits first, the exhibits the defendants want to
16 introduce, and then try to resolve all the issues that
17 still exist on the Plaintiff's Exhibits.
18 It is 3:25, I don't have to be at a dinner
19 until about 6:30, so I've got a lot of time to get it
20 resolved, but I would really like to expedite the
21 process. I'll be back at 4:00 o'clock. Hopefully by
22 that time you all will have your act together. And
23 you will leave Brian in charge as far as that is
24 concerned.
25 MR. SMITH: Yes.

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1 THE COURT: Mrs. Tompkin, you can stay if you
2 want to, but this is kind of like watching paint dry.
3 There is one more thing to take into
4 consideration for tomorrow, that is, I have a major
5 suppression hearing in a criminal case at 4:00
6 o'clock. Three defendant's. It may last a couple
7 hours. I'm shuting down this case at 4:00 o'clock.
8 MR. COFER: Can I ask this question then?
9 Does that mean we'll probably close Friday morning?
10 THE COURT: I don't know. All I'm saying at
11 4:00 o'clock I'm shutting this case down. If all I'm
12 doing is finishing my jury instructions I may go to
13 4:15. The jury instructions are preceding the

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14 argument. I would like to get the jury instructions
15 in tomorrow, although if Russ is going to read from
16 the deposition, that may take three hours alone; and
17 then you have Sidransky.
18 MR. COFER: We have to prepare a closing
19 argument to summarize the evidence for the jury. We
20 have jury instructions, potential rebuttal; we need to
21 coordinate them on four defendants.
22 THE COURT: That's why they pay you all the
23 big bucks.
24 (Brief Recess.)
25 THE COURT: Do you have an index to your

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1 exhibits?
2 MR. PROCTOR: Yes, I do, your Honor.
3 THE COURT: Okay. You have four pages of
4 exhibits.
5 MR. PROCTOR: Correct, your Honor.
6 THE COURT: Have you conferred with opposing
7 counsel?
8 MR. PROCTOR: I have, your Honor.
9 THE COURT: Which ones are offered for which
10 there are no objections?
11 MR. PROCTOR: Your Honor, the ones that are
12 offered for which there is no objection is the third
13 one. It is a two page document that is stapled
14 together. And the title of it is Sources of
15 Demonstratives Used With Hoff.
16 THE COURT: I don't have a three page thing
17 stapled together, I have four pages.
18 Okay. You are starting -- the first page,
19 sources of demonstrative, that's the one you are
20 directing my attention to.
21 MR. PROCTOR: That's correct.
22 THE COURT: Very good.
23 MR. PROCTOR: And the defendants offer each
24 of these documents that were used with and referred to
25 by Dr. Joan Hoff during her direct and redirect

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1 examination during trial.
2 And my understanding, Mr. Nace can correct
3 me if I'm wrong, the plaintiffs have no objection to
4 the admission of any of the documents on this two page
5 sheet.
6 MR. NACE: That's correct, your Honor.
7 THE COURT: There is one crossed off, Miller
8 Lois Maddox v. James Monahan.
9 MR. PROCTOR: That's correct. The defendants
10 are withdrawing that document.
11 THE COURT: Otherwise the exhibits on that
12 page are admitted.
13 All right.
14 What about the second page?
15 MR. PROCTOR: The exact same stipulation,
16 your Honor. Page 2 of that same document also are
17 documents defendants are offering and for which
18 plaintiffs have no objection to their admissibility
19 each just had and offered with Dr. Hoff.
20 THE COURT: All right. They are admitted.
21 MR. PROCTOR: And at the appropriate time,
22 your Honor.
23 THE COURT: Is that it? Is that the total
24 list.

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25 MR. SUFFERN: Your Honor, American Tobacco

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1 Company --
2 MR. PROCTOR: Your Honor, there are two pages
3 I handed you, one is entitled exhibits used on direct
4 or redirect of Hoff. The first document is inked out;
5 that's the frank statement.
6 THE COURT: That's already in.
7 MR. PROCTOR: Correct. The second two
8 documents on there were also used with Joan Hoff, and
9 the defendants are offering those, and plaintiffs have
10 stipulated to their admissibility.
11 THE COURT: Is that correct?
12 MR. SMITH: That's correct, your Honor.
13 MR. PROCTOR: The last sheet, your Honor, is
14 entitled demonstratives used during the direct or
15 redirect of Hoff. This would involve only one
16 argument. There is a dispute on these, your Honor.
17 Each of these are demonstratives, not the boards but 8
18 and a half by 11 paper size of the boards, we used
19 with Hoff. And the defendants, over plaintiffs
20 objections, offer these under Rule 1006 as a summary
21 exhibit, as all of the underlying documents are also
22 in evidence.
23 MR. NACE: The plaintiff does object. These
24 are prepared by counsel. We have the underlying
25 documents already going to the jury, and I believe

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1 when we attempted to submit demonstratives from our
2 end those were excluded, and we feel these should not
3 go to the jury.
4 THE COURT: Can you show me? I don't know
5 what I'm looking at.
6 MR. PROCTOR: Your Honor.
7 THE COURT: Are they big boards?
8 MR. PROCTOR: No, this is what would be
9 admitted into evidence, that's the entirety of it.
10 MR. NACE: They are representations of the
11 boards, your Honor.
12 MR. PROCTOR: They are exact duplicates of
13 the boards with the exception of the exhibit sticker.
14 THE COURT: Are these exhibits separately in
15 the --
16 MR. NACE: Yes, your Honor, I believe
17 they are.
18 MR. PROCTOR: That's correct, your Honor, the
19 first sheet to which plaintiffs had no objection are
20 the underlying supporting exhibits which are
21 referenced on those demonstratives. So all of the
22 information there had been admitted into evidence,
23 just not the demonstrative itself.
24 MR. NACE: This is very much akin to the
25 highlighting we had on a couple of ours that was not

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1 admitted, that counsel has highlighted and emphasized
2 portions of it, that the jury already has the complete
3 document, so they wouldn't need to see just these
4 portions.
5 THE COURT: There have been so many
6 demonstratives displayed to the jury. Are the
7 defendants offering any other demonstratives they have
8 shown?
9 MR. PROCTOR: I believe the only other one we

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10 are offering is, I believe Mr. Suffern has one or two
11 small copies of pieces of lung tissue of Mr. Tompkin
12 that I believe are copies of micro photographs.
13 MR. SUFFERN: Those would not be considered
14 demonstrative. I think we have an agreement this is
15 evidence.
16 MR. NACE: These are different. These are
17 the photographs that he testified about, and we don't
18 have any problem with the photographs; but not the
19 boards.
20 THE COURT: I don't understand any
21 plaintiff's demonstrative exhibits have been marked
22 and offered.
23 MR. NACE: Yes or no, your Honor? We did
24 mark and offer, I believe. For one, the Smith are --
25 we had the big board and I thought the ruling was we

1 weren't allowed to use that. And I don't recall
2 whether on the Sidransky one we may have marked that
3 one also, your Honor. And we also had the time line
4 which was on our exhibit list as well. And my
5 understanding is those were not going in. We would
6 like, I mean, obviously the defendants get theirs we
7 would like ours, but we would prefer none of them go
8 in.
9 THE COURT: I'm somewhat indifferent to what
10 is done here, but my reaction to all this is, either
11 all the demonstratives go in or none of them go in.
12 And if you all can agree on which way you want to do
13 it, fine. But I mean, if there is a dispute, none of
14 them are going in.
15 The jury might want them, really, because
16 it might assist their deliberative process. But I
17 need an agreement from counsel. You may want to defer
18 and talk about that overnight.
19 MR. PROCTOR: Your Honor, on behalf of
20 defendants we would agree that if all of our
21 demonstrative exhibits that I offered are admitted
22 into evidence, we would not object to the previous
23 demonstratives the defendants have used. I don't know
24 what they will use with Dr. Sidransky tomorrow.
25 THE COURT: I've seen a lot of demonstrative

1 exhibits on both sides. You talk about that tonight,
2 and since not all counsel are here, I would rather
3 wait and see if there is common agreement by all
4 counsel rather than put the two of you under pressure
5 to make that decision.
6 I used to be a lowly assistant.
7 MR. PROCTOR: Well, I appreciate that
8 comment.
9 THE COURT: And I also, you know, when you
10 are in that role you are always worried somebody is
11 going to say, what did you do that for, after you
12 agreed to it.
13 MR. PROCTOR: Well, the people who have that
14 authority are busy.
15 THE COURT: That's why I would rather do it
16 in the way I outlined.
17 MR. PROCTOR: If I could summarize, your
18 Honor, I believe where we are at, with the exception
19 of the document I crossed out, Miller Lois Mattox
20 versus James Monahan, the source of demonstratives

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21 used with Miller and Hoff on direct have been
22 admitted. And the page that has two entries titled
23 exhibits used on direct with Hoff with the frank
24 statement being crossed out have been admitted.
25 THE COURT: I agree. The only thing we

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1 haven't agreed on is demonstrative exhibits. And if I
2 were a juror I would want it all back there. It seems
3 to me it would help in the process.
4 But I don't want to, I'm just giving you
5 what my feeling would be were I a juror. Maybe they
6 paid close attention, but it is hard to absorb all
7 that, and it is easy to go back and look at it,
8 especially if they get to discussing it among
9 themselves what they have heard. It will just be
10 easier for the deliberative process.
11 So I'll encourage you to agree. Make sure
12 they are all marked in some fashion, and make sure
13 what they are and back they go. Some of them may not
14 even be marked as an exhibit at this point, but I
15 would like them all to have an exhibit number for the
16 record, so that if any reviewer would know exactly
17 what we sent back.
18 MR. PROCTOR: And could I ask your Honor,
19 would you like us to -- and of course we are willing
20 to put the admitted documents into the notebooks for
21 the jurors, or would you not like us to do that?
22 Whatever your Honor prefers.
23 THE COURT: I'd prefer that unless we are
24 going to do, unless all exhibits are going to be in
25 notebooks, not to do it. I don't want to have

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1 defendants in a different.
2 MR. SMITH: We are willing to do that too,
3 your Honor.
4 THE COURT: If you can work that out, God
5 bless you.
6 MR. PROCTOR: And should we prepare, I don't
7 know, would your Honor like a copy, or how would you
8 like us to do that?
9 THE COURT: The thing I would like to have,
10 if you are going to do that, if you've got enough
11 troops around here you could probably do it. Have an
12 index so they can go to your index and find the
13 exhibit and know where it is. I know they would bless
14 you for that.
15 MR. SUFFERN: Should we -- I think we have
16 agreement on the only exhibits being offered by
17 American Tobacco, and that's Defendants Composite
18 Exhibit AT 2225, which are thumbnail prints of Dr.
19 McCue's slide. If we want to put the board exhibits
20 in, we --
21 THE COURT: Chris, do you have that number?
22 MR. SUFFERN: AT 2225. Three 2's and a 5.
23 Defendants' Composite Exhibit AT 2225. Thank you.
24 MR. PROCTOR: And I did have one last point
25 on the Dr. Elizabeth Whelan deposition. Since we took

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1 the deposition, we would be able to designate portions
2 that we would like read to the jury subject to
3 objection. Could we have that opportunity?
4 THE COURT: Yes. And the difficulty that
5 arises with that, it gets broken up and it is really

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6 hard to follow. I don't know how long the deposition
7 is, but.
8 MR. SMITH: The first one was very long.
9 THE COURT: I mean how long? Two days.
10 MR. NACE: Seven hours, eight hours,
11 something like that.
12 MR. PROCTOR: Here is the issue. The first
13 deposition was taken, of course, obviously before the
14 Sixth Circuit's opinion, and it was a full day.
15 The second deposition, after we had the
16 issue crystallized by the Sixth Circuit, was taken;
17 that was about 2 hours. There are two depositions
18 about three years apart.
19 THE COURT: Here is the way I would like to
20 have it presented and is as follows:
21 That once there is an agreement of all
22 that is be to be read to the jury, that it simply be
23 read to the jury without any indication of whose
24 testimony it is. And you can, you -- we could handle
25 it in such a way that once we know what we are doing

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1 that we might use plaintiff's counsel for a while and
2 read the questions and answers and then substitute
3 defendant's and let them do it. But I would rather do
4 it in such a way that it is unclear as to who is
5 asking the questions or why they are being asked. It
6 is just testimony.
7 MR. PROCTOR: I agree.
8 THE COURT: If you are just jumping back and
9 forth, this is my testimony and this is my testimony,
10 that's incredibly confusing to the jury. It is tough
11 enough to follow it under the process I'm outlining.
12 So that would be my preference, that once
13 you agree on what's going to be read and agree on the
14 order in which it is going to be read, that it then
15 just be continuously read without interruptions.
16 I also assume there are going to be no
17 objections, so it is going to be read without
18 objections. Now if you are going to have objections,
19 it is a whole different can of worms.
20 MR. PROCTOR: I can tell your Honor we'll
21 object to the Tobacco Institute and CTR information
22 coming in, particularly the Tobacco Institute,
23 particularly since the Tobacco Institute does not
24 appear anywhere in Dr. Whelan's report.
25 THE COURT: How does it even develop? She is

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1 now a rebuttal issue on common knowledge.
2 MR. PROCTOR: That's correct. Solely common
3 knowledge. Since the defendants did not put on a duty
4 to warn expert, I believe the only thing that is fair
5 for Dr. Whelan is common knowledge.
6 Dr. Whelan -- Mr. Nace will fill you in
7 more -- has in fact reviewed newspaper and magazines
8 of some sort. A little different methodology from Dr.
9 Hoff, but that is the type of information I think we
10 are talking about.
11 She has, as you probably know, your Honor,
12 a variety of opinions on nearly every topic. And for
13 that reason, you know, we will be objecting to a lot
14 of that type of information that goes well beyond the
15 common knowledge issues.
16 THE COURT: Well, I'm hopeful that you will

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17 all be here in the morning ready to tell me what you
18 are going to do on Whelan. And if there are going to
19 be disputes to be resolved, I'll resolve them. But
20 what I really want is a reading uninterrupted by
21 objections. I call this sanitizing the deposition, so
22 that once it's read, the jury -- and it is tough for
23 the jury to concentrate on what is being said because
24 it is not video, and it is hard to track it. And the
25 people who read it are going to have to read so slow

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1 that you think you will fall asleep reading it,
2 because if you start to read fast it is hopeless.
3 MR. PROCTOR: And what time would your Honor
4 like us to show up? Because I can virtually guarantee
5 you there will be some objections. Whatever is fine.
6 THE COURT: Let's be optimistic and assume
7 you can work it out. But I would like to see you by
8 9:00 o'clock.
9 MR. PROCTOR: We'll work on it tonight and be
10 here by 9:00, and if there are objections to resolve
11 we do it then.
12 THE COURT: And I'm not sure how you, because
13 what it sounds like you may want to, you may want to
14 integrate the two depositions into one document.
15 MR. PROCTOR: And what we'll do, we'll just
16 have highlighted the portions and question and answer
17 sessions.
18 THE COURT: I think Russ has to go first and
19 say what he wants to present, and then you say this is
20 what I want to present, and then we have to figure out
21 how to integrate it into such a fashion it is just
22 read without regard.
23 And I'll tell the jury what happened, this
24 is a deposition, this is a deposition testimony, and
25 that it may be a little disjointed because of the

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1 manner in which it was taken. And it was not taken in
2 anticipation of use at trial, but it turned out Dr.
3 Whalen is not available. And so, as an alternative,
4 we are putting in the deposition.
5 I think you start out by who is she, her
6 background, so the jury knows who the person is, and
7 try to develop it. It takes some ingenuity to put it
8 together, I realize that.
9 MR. PROCTOR: We'll work on that.
10 THE COURT: Okay. I'll see you in the
11 morning.
12 Now we are struggling trying to get a
13 charge together. And if somebody wants to stick
14 around until about 5:00 I might have something to give
15 you, as the jury instructions is concerned.
16 Diane, why don't you stick around.
17 MS. CHAPMAN: I'll be here.
18 THE COURT: That way you can charge for the
19 next 45 minutes.
20 MR. PROCTOR: She will anyway.
21 MS. CHAPMAN: And I object.
22 And your Honor, I object to the previous
23 remark about crystallization by the Sixth Circuit. I
24 think that still might be up to debate, but we'll see.
25 MR. PROCTOR: I smiled when I said that.

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1 MS. CHAPMAN: I understand.

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THE COURT: Well, if you want to just kind of wander back to chambers about 5:00. We are working now. I'm trying to get it as complete as possible. Okay?

MR. SUFFERN: Thank you, your Honor.

THE COURT: We don't need the court reporters any more today?

MR. SUFFERN: I don't think so.

(Hearing adjourned.)

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C E R T I F I C A T E

We, Susan Trischan and Richard G. DelMonico, Official Court Reporters, in and for the United States District Court, for the Northern District of Ohio, Eastern Division, do hereby certify that the foregoing is a true and correct transcript of the proceedings herein.

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Susan Trischan
Official Court Reporter

_____
Richard G. DelMonico
Official Court Reporter

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